Filed 5/28/19 P. v. Power CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSHUA CODY POWER,

Defendant and Appellant.

F075750

(Tuolumne Super. Ct.
Nos. CRF49228 & CRF51745)

OPINION

APPEAL from a judgment of the Superior Court of Tuolumne County. Donald I. Segerstrom, Jr., Judge.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Craig S. Meyers, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant/defendant Joshua Cody Power physically assaulted his wife. He was arrested and released on bail. While he was on bail, he assaulted a former girlfriend and

was again arrested. At his jury trial, his wife refused to testify against him. Defendant was convicted of seven counts based on the first incident and two counts based on the second incident. He was sentenced to the second strike term of 33 years four months in prison.

On appeal, defendant argues the court improperly allowed a deputy sheriff to testify about the hearsay statements made by defendant's wife immediately after the assault. Defendant contends the deputy's testimony constituted inadmissible testimonial hearsay in violation of the confrontation clause of the United States Constitution and *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).

Defendant also raises several sentencing issues. We affirm his convictions and remand the matter on sentencing issues.

FACTS

DEFENDANT'S ASSAULT ON MS. POWER

(Case No. CRF49228; Counts I–IX)

As of January 2016, defendant and Kayla Power were married, but they had separated and lived apart. Ms. Power and her baby were living with Steven Meeks at his home in Groveland.

Stephen Fulton, defendant's uncle, testified that in the days prior to the incident in this case, defendant repeatedly talked to him about Ms. Power, and he was "infatuated" with her and what she was doing. Fulton told defendant to "let it go" and stay away from her.

Defendant Forces Kizziar to Drive him to the House

On January 18, 2016, Damon Kizziar received a call from defendant. They were friends and talked about doing something together. Kizziar drove to defendant's home in Groveland and picked him up.

When defendant got into Kizziar's Jeep, he told Kizziar to take him to see Ms. Power. Kizziar tried to talk defendant out of it because he knew defendant and Ms. Power were having issues, they often argued, and he was afraid there would be drama.

Kizziar testified defendant produced a box cutter and exposed the blade to Kizziar. Kizziar drove to Meeks's house. Kizziar testified he feared for Ms. Power's safety, and he kept trying to talk defendant out of seeing Ms. Power. At some point during the drive, defendant took Kizziar's cell phone away from him.

When Kizziar arrived in the neighborhood, he parked a few hundred yards from Meeks's house. Defendant got out of the car; he still had Kizziar's cell phone. Defendant walked to Meeks's house and Kizziar lost sight of him. Kizziar still had his car keys but stayed in the Jeep and did not leave the area.[1]

Defendant Arrives at Meeks's House

Donald Cravens and his elderly mother lived next to Steven Meeks. David Smith was doing some work at Cravens's house and saw defendant run across the driveway and front yard. Defendant ran up to Meeks's front door, opened it, and went into the house. Smith finished his work and drove away from Cravens's house.

Cravens testified his mother was outside their house and yelled to him that there was a guy " 'beating the shit out of this girl out there.' " Cravens looked outside and saw Ms. Power. Cravens's mother was yelling, " 'Leave her alone.' "

Cravens testified Ms. Power was on the wet ground between the two homes. Defendant was holding Ms. Power by her collar, and she had a baby in her arms. Ms. Power was rolling back and forth, she was crying, and she screamed that " 'he's hitting me.' " Ms. Power yelled for Cravens to help her.

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[1] Kizziar testified he did not want to appear at trial and admitted he had failed to appear twice after being served with a subpoena. Kizziar claimed not to remember the incident or his prior statements to the police, and insisted defendant never threatened him and he was not afraid of defendant.

Cravens testified he did not see defendant hit Ms. Power, but he told defendant to stop it and "[g]et out of here. I will call the police."

Cravens testified defendant did not say anything but still "had ahold" of Ms. Power. Cravens again told defendant that he was going to call the police and went into his house to call 911. Cravens testified defendant walked away like he was not worried.

Defendant Returns to Kizziar's Jeep

In the meantime, David Smith was driving home and noticed Kizziar was sitting in his Jeep parked in a turnout about a quarter mile from Cravens's house. Smith knew Kizziar and was concerned that he was having problems with the Jeep. Smith stopped and asked Kizziar what was going on. Kizziar replied that he could not tell him "what was going on. He seemed to be a little bit distressed, teary eyed, anxious, nervous." Kizziar "was basically crying on the side of the road." Smith decided that everything was okay and drove home.

Kizziar testified defendant jogged back to his vehicle after being gone for about 10 minutes. Kizziar testified defendant said, " 'I'm going to go back to prison.' "

Kizziar drove defendant to downtown Groveland. Defendant gave Kizziar's cell phone back to him and walked away.

Kizziar drove to his home in Groveland. He did not call the police because he did not want to get involved in anything.

Smith Returns to Meeks's House

Smith testified that when he got home, he received a call from Cravens. Cravens told Smith to return because defendant was there and " 'in a fight with Kayla,' " and he was " 'kicking her ass.' "

Smith drove back to Cravens's house, but defendant was gone. Ms. Power and the baby were at Meeks's house, and they both "looked a little roughed up." Ms. Power had a "fat lip and some blood coming out," and her "entire face" looked like she had been in

some sort of "confrontation." Smith saw red spots on the baby's head, and Ms. Power was concerned about the child because he had been in the middle of the incident.

Ms. Power's Statements to Deputy Durnall

At 12:07 p.m., Deputy Durnall of the Tuolumne County Sheriff's Department received a dispatch to respond to Meeks's house because a neighbor reported a man was beating his wife at that location. Durnall arrived within 20 to 30 minutes and found Ms. Power outside the house with four men, one of whom was holding a baby.

Ms. Power had a swollen lip, multiple scratches on her neck, throat, shoulders, and chest, and redness on the side of her face. There was bruising and a small laceration on her lip. The baby was a year old and had redness on his left temple.

Deputy Durnall testified Ms. Power was crying and upset. She said defendant left in a green Jeep, and he was holding Kizziar at knifepoint. Durnall relayed this information to dispatch.

Deputy Durnall asked Ms. Power what happened.[2] Ms. Power was still crying and upset but able to speak to him. Ms. Power said she had left defendant the prior week and was staying with Meeks. Ms. Power said she and Meeks were the parents of the baby.

Deputy Durnall testified Ms. Power said she was in the kitchen with her baby and her niece when defendant ran into the house unannounced. No one else was present. Defendant said, " 'I caught you you f[**]king bitch.' " Defendant ran toward Ms. Power and grabbed her hair. Defendant held onto her hair and used his other hand to punch the

[2] As we will explain in issue I, Ms. Power refused to testify at trial and claimed her Fifth Amendment privilege. Thereafter, the court granted the prosecution's motion for Deputy Durnall to testify about the statements Ms. Power gave at the scene. The court found her hearsay statements were admissible as spontaneous declarations and were not testimonial. On appeal, defendant concedes Ms. Power's statements to Deputy Durnall were spontaneous declarations but argues the evidence was testimonial and inadmissible pursuant to *Crawford*.

right side of her face while she was still holding the baby. Her ears began ringing and she felt as if she was going to lose consciousness.

Ms. Power said she held onto the baby. Defendant pushed her up against the wall and stuck his fingers in her mouth. He said, " 'You should have … just came home. You've been lying to me.' "

Deputy Durnall testified that Ms. Power said she tried to run out of the house through the side door, but defendant shut the door in front of her and began to hit her again. Ms. Power said one of defendant's punches hit the baby on the side of the head. The baby's eyes rolled back in his head as if he was about to losing consciousness.

Ms. Power told Deputy Durnall that defendant knocked her and the baby to the ground, dragged them into a bedroom, and pinned Ms. Power on the bed. Defendant stuck his fingers in Ms. Power's mouth again and accused her of having sex with Meeks. Ms. Power bit defendant's fingers and drew blood. Defendant pulled out a box cutter and told Ms. Power "to get the kids ready; they will be walking outside."

Defendant and Ms. Power went back to the kitchen, and he was still holding the box cutter. Ms. Power told defendant he would go back to prison for this and he needed to leave. Defendant told Ms. Power he would kill her if she screamed. Ms. Power was afraid he was going to kill her and the baby.

Ms. Power said defendant told her they were going to walk down the street; Kizziar was parked down the road; and he had put a knife to Kizziar's throat and forced him to drive to Meeks's house.

Ms. Power said she was still holding the baby, and she tried to grab her cell phone. Defendant forcefully grabbed the cell phone out of her hand.

Ms. Power ran out of the house. She tripped and fell with the baby. Defendant stood over her, grabbed her by the hair, and was about to hit her again. Ms. Power said the neighbor intervened and yelled at defendant. Defendant ran down the street and "took off."

Deputy Durnall testified that as Ms. Power described what happened, she voluntarily took him into the house and showed him where defendant had pushed her against the wall and hit her, and where she ran away from him. Durnall did not see any signs of forced entry into the house.

Deputy Durnall testified Ms. Power spoke to him for about 10 minutes. He only asked clarifying questions, such as which hand defendant used to hit her and whether he used an open or closed fist. Durnall did not mention or ask her about a box cutter or a knife. She was upset and crying during the conversation.

Deputy Durnall offered Ms. Power a form for a victim of domestic violence. She filled it out and reported she had been hit a couple times on the neck and the upper lip, three to four times on the right side of the cheek, and three times on the side of her head.

Defendant's Statements to his Uncle

Deputy Hunt testified that while the deputies were at Meeks's house, he was trying to find defendant. He received information that defendant had taken Ms. Power's cell phone. Hunt had the cell phone company "ping" her device and determined it was near the workplace of Stephen Fulton. Deputy Hunt called Fulton and asked if defendant was there, and Fulton said no.

At trial, Fulton testified that defendant was present when Deputy Hunt called. Fulton lied and told Hunt that defendant was not there. Fulton did not want defendant to know he was talking to an officer because he was afraid for the safety of his sister and young niece, who were also present. Fulton testified he knew defendant "was on something, and I wasn't sure what he was going to do. I've gotten into it with him a few times."

Deputy Hunt testified Fulton later called him back and apologized for lying. Fulton told Hunt that defendant had been standing next to him when Hunt had called earlier. Fulton explained that he was afraid defendant would hurt his family if he told Hunt that defendant was at the shop. Fulton reported that when defendant arrived at the

workplace, he said "that he was going back to prison, that he had beaten Kayla up." Defendant told Fulton he pulled a box cutter on Kizziar and forced him to drive to Ms. Power's house. Fulton told defendant he should not go over there, and he should "let it go." Fulton also told defendant to turn himself in to the authorities.

Kizziar's Statements to Deputy Hammell

Deputy Hammell was advised that defendant had left Meeks's house in Kizziar's green Jeep, and he was holding Kizziar at knifepoint. Hammell drove to Kizziar's house, and saw his Jeep parked in the front.

Deputy Hammell contacted Kizziar and asked if he knew why he was there. Kizziar said yes, and Hammell asked him what happened.[3]

Deputy Hammell testified Kizziar said defendant called him for a ride, and he thought they were going to the casino. Defendant got into the Jeep and said, " 'Take me to Kayla's.' " Kizziar said, " 'No way.' " Kizziar said defendant pulled out a box cutter and exposed the blade. He looked at Kizziar and said, " 'Really?' " Kizziar asked defendant if he had lost his mind. Defendant again told Kizziar that he was going to take him to see Ms. Power.[4]

Deputy Hammell testified Kizziar said he was afraid because defendant held the box cutter in a threatening manner, and he believed defendant would stab him if he did not take him to see Ms. Power. Kizziar drove to Meeks's house but kept trying to convince defendant not to see her. When they arrived, defendant told Kizziar that he had better wait for him and got out of the Jeep. Kizziar felt like a coward and feared for Ms. Power's safety. He could not call for help because defendant took his cell phone.

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[3] At trial, Kizziar testified a deputy arrived at his house to question him and it was "a little intimidating." Kizziar gave a statement but could not remember what he said.

[4] At trial, Kizziar testified that he did not ask defendant if he lost his mind. Kizziar denied defendant threatened him, defendant ordered him to drive to where Ms. Power was staying, or defendant ordered him to wait in the Jeep until he returned.

Kizziar said while he waited in the Jeep, a friend stopped to see if he was okay. Kizziar thought about telling his friend what was going on, but he was afraid defendant would retaliate against him.

Deputy Hammell testified Kizziar said that when defendant ran back to the Jeep, he said, " 'I wish I never did that.' " Kizziar asked what happened. Defendant said, " 'I got her.' " Kizziar asked defendant if he "hit her like a man." Defendant replied, " 'I am going back to prison.' "[5]

Arrest of defendant

On January 26, 2016, deputies received information that defendant was staying at a house outside Groveland, and he had just left in a car. Multiple units responded to the area, located the vehicle, and conducted a traffic stop.

After the vehicle stopped, a person popped up in the backseat and ran out of the vehicle. The deputies recognized defendant and repeatedly ordered him to stop. Defendant ignored the orders and kept running. An officer advised defendant that a K-9 would be released, but defendant continued to run. As the dog went toward defendant, defendant grabbed the animal's harness and tried to stop it. Defendant and the dog fell off the edge of the road's embankment.

The deputies followed defendant down the embankment and placed him in custody. Defendant had been bitten by the dog and was taken to the hospital. He was medically cleared and booked at the jail. He was found in possession of some type of knife.

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[5] Also, at trial, Kizziar testified he continued to hang out with defendant after he was charged in this case. Defendant never threatened Kizziar even though defendant was facing "the charges from me, which meant I was a rat." Defendant and Kizziar were together in March and October 2016. Kizziar admitted that in those same months, he sent letters that recanted his allegations against defendant.

Convictions

Based on this incident, defendant was charged and convicted of the following offenses, and the jury found the personal use allegations true:

> Count I: kidnapping of Kizziar (Pen. Code, § 207, subd. (a)),[6] with the personal use of a deadly and dangerous weapon, a box cutter (§ 12022, subd. (b)(1));
>
> Count II, corporal injury to a spouse, Ms. Power (§ 237.5, subd. (a));
>
> Count III, first degree residential robbery of Ms. Power in an inhabited dwelling house (§ 211), with the personal use of deadly and dangerous weapon, a box cutter;
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> Count IV, first degree burglary (§ 459);
>
> Count VI, false imprisonment by violence of Ms. Power (§ 236);
>
> Count VII, criminal threats to Ms. Power (§ 422, subd. (a)); and
>
> Count VIII, misdemeanor resisting arrest (§ 148, subd. (a)(1))[7]

DEFENDANT'S ASSAULT ON MS. MARTINEZ

(Case No. CRF51745; Counts X and XI)

In the summer of 2016, Meghan Martinez[8] and defendant were in a dating relationship.[9] Ms. Martinez testified that they were no longer in a relationship in November 2016.

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[6] All further statutory citations are to the Penal Code unless otherwise indicated.

[7] Defendant was also charged with count V, corporal injury to a child (§ 273d, subd. (a)), and count IX, a second charge of kidnapping Kizziar based on defendant's return to the Jeep after he ran from Meeks's house. Defendant was found not guilty of these offenses.

[8] Ms. Martinez was identified as a "confidential victim" in the information. When she testified at trial, she waived any confidentiality and said she wanted to use her true name.

[9] Defendant was arrested in January 2016 for assaulting his wife, but he was released on bail pending trial.

On the night of November 5, 2016, Jessie Gunn was at the Iron Door Saloon in Groveland. He went outside to smoke a cigarette and saw Ms. Martinez lying on the ground, across the street from the saloon. Gunn immediately went to help her. She had a bloody nose, and there was blood across her cheeks and the lower part of her face. Gunn thought she looked like she had almost been hit by a car. Gunn picked her up and brought her to the saloon, and someone called 911.

Gunn asked Ms. Martinez what happened but she did not reply. She was shaking and crying and seemed a little intoxicated. She also appeared scared about what had happened. After about 30 minutes, while they were waiting for the sheriff, Ms. Martinez was still crying and said she went to defendant's house, they "got in a thing," and defendant beat her and caused her injuries.

Ms. Martinez's Statements to the Deputies

At 11:11 p.m., Deputies O'Brien and Hammell received a dispatch to respond to the saloon because someone had been hit by her boyfriend's car. They arrived within 30 minutes. Gunn directed them to Ms. Martinez.

Ms. Martinez was sitting in a booth. She was crying, scared, and extremely upset. There was dried blood on her hands. She would not make eye contact with the deputies. Deputy O'Brien asked her to look at him, so he could see if she was injured. She looked up and O'Brien saw dried blood around her nose, a cut on her lower lip and chin, and dried blood in the center of her chest. Ms. Martinez kept grabbing her neck and said it hurt. O'Brien offered to call for medical assistance, but she refused. There was dried grass and weeds stuck on her jeans.

Deputy Hammell asked her name and she identified herself. Hammell testified her nose and lips appeared swollen. She was bleeding from her nose, lips and mouth, and blood appeared to have run down her neck and onto her clothing.

Deputy O'Brien asked Ms. Martinez what happened. Ms. Martinez said it was her fault and "[s]he shouldn't of went over there. 'He told me not to but I did anyways.' " She did not want to say anything else and did not want him to get into trouble.

Deputy O'Brien asked who she was talking about, and she said "Josh." O'Brien asked if she meant "Josh Power." Ms. Martinez started to cry hysterically and shook her head yes.

Deputy O'Brien asked what happened. Ms. Martinez said nothing happened and she fell, but she could not remember why she fell. O'Brien said he did not believe she was telling the truth. Ms. Martinez said she wanted the night to be over, and she wanted to leave.

Ms. Martinez again said it was her fault and added, "I just wanted to go over there and catch him in the act cheating on me because I know he was, and I love him."

Ms. Martinez said she wanted to go outside and smoke a cigarette, and asked Deputy O'Brien not to leave her side because she was scared and did not want to be alone. They went outside and she appeared to calm down as she smoked.

Deputy O'Brien again asked Ms. Martinez what happened. She said that she went to defendant's house even though he told her not to. She was outside the house, looked through a window, and saw defendant with a woman she named as "Jeena," later identified as Jeena Eunice. Ms. Martinez told defendant and Jeena that they were " 'both pieces of shit … and you guys are meant for each other.' " Ms. Martinez started to leave, but defendant went outside and confronted her. They argued, and she started to walk away. Defendant asked if she was really going to leave, and then grabbed the back of her neck, forced her to the ground, and started to drag her into his house.

Ms. Martinez said she did not want to give any more information because she was afraid of defendant, she did not want him to get into trouble, and she was worried he would retaliate if he knew she talked to the deputies. She cried throughout her statement.

Deputy O'Brien convinced Ms. Martinez that she should be evaluated by an EMT and she agreed. As she was treated, Ms. Martinez shared certain information with the EMT. Thereafter, the EMT advised Deputy Hammell about the statement.

Deputy Hammell talked to Ms. Martinez again and said he learned she had been in a domestic violence dispute with defendant; she had been struck in the face several times with a closed fist; and she was dragged back to the house by her neck. Ms. Martinez did not deny that happened to her, but she refused to give any more information.

Deputy Hammell advised Ms. Martinez that she could obtain an emergency protective order. She asked him to contact the judge and request it for her. She wanted to leave and did not feel comfortable because she was so close to defendant's house.

At 1:12 a.m., Deputies O'Brien and Hammell went to the residence of defendant's mother, which was about 100 yards away and on the same road as the saloon. No one was present. As they walked around the exterior, Deputy Hammell found a drop of fresh blood near a wooden gate.

Ms. Martinez's Statements to the Investigator

On November 14, 2016, Jeffrey Snyder, the chief investigator for the district attorney's office, spoke with Ms. Martinez about the assault. Ms. Martinez was crying, emotional, withdrawn, and visibly shaking. She seemed reluctant to cooperate but answered questions.

Snyder testified Ms. Martinez said she went to defendant's house to see if he was with another woman. Ms. Martinez and Ms. Eunice argued, and Ms. Eunice called for defendant to help her. Defendant grabbed Ms. Martinez by her neck and punched her in the nose. Defendant picked up Ms. Martinez and threw her over the fence and told her not to come back. Defendant showed her a handgun that was tucked into his waistband. He grabbed the gun "in a threatening manner."

Snyder asked Ms. Martinez about her statements to the EMT on the night of the incident. Ms. Martinez confirmed the accuracy of the statements. Ms. Martinez said

defendant had once threatened to choke her if she refused to have sex with him, and she was afraid he would do it.

Ms. Martinez's Trial Testimony

At trial, Ms. Martinez testified she did not recall the evening of November 5, 2016. She woke up one morning with a split lip and blood on her clothes. Ms. Martinez could not remember anything about the incident because she was drinking vodka and was "really, really drunk that day."

Ms. Martinez recalled that she argued with defendant's girlfriend, who yelled for defendant, and he grabbed Ms. Martinez by the neck. He dragged her and told her to get off his property. Ms. Martinez could not remember who hit her or whether she made prior statements to deputies, and she did not want defendant to go to prison. Ms. Martinez did not want to testify against defendant and said she could not remember speaking to officers about the incident.[10]

Defense Evidence

Defendant did not testify or present any evidence regarding the assault on Ms. Power.

Jeena Eunice testified for the defense about the charges involving Ms. Martinez. Ms. Eunice testified that at the time of trial, she was in a relationship with defendant and was expecting his child. She was at defendant's house on the night that Ms. Martinez arrived. She knew Ms. Martinez and defendant had just broken up.

Ms. Eunice testified Ms. Martinez was on the front porch, and "freaking out" that she had dropped a $20 bill. Ms. Eunice told defendant to stay in the house, and she went outside to help her find the money, so she would leave. Ms. Martinez kept trying to push open the door. Ms. Martinez got into her face and pushed her. Ms. Eunice pushed her

[10] Ms. Martinez appeared at the sentencing hearing and told the court that she did not want defendant to get into trouble or go to prison.

back and they threw punches at each other for about a minute. Defendant heard the commotion and came outside. Ms. Eunice told defendant to get Ms. Martinez off her. Defendant split them up and told Ms. Martinez to knock it off. Ms. Martinez ran away. Defendant did not hit Ms. Martinez or throw her over the fence. Ms. Eunice did not see any blood on Ms. Martinez's face.

Ms. Eunice testified that after Ms. Martinez left, they went back into the house for a while and waited to see if the police were going to arrive. No one came, so they went to a friend's house around 2:00 a.m.

Ms. Eunice admitted that in January 2015, she was stopped by the police because she stole bottles of perfume from Grocery Outlet, and she provided a false name and birthdate. In April 2015, she was convicted of giving a false name to an officer in violation of section 148.9. She also admitted that in December 2016, she was stopped by Deputy O'Brien and gave him four false names and fake identification cards.

Convictions

Based on the assault on Ms. Martinez, defendant was charged and convicted of:

> Count X, corporal injury to Ms. Martinez, a person whom he had or previously had a dating relationship, with three prior convictions, alleged pursuant to section 273.5, subdivisions (a) and (e)(2));[11] and
>
> Count XI, false imprisonment by violence.[12]

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[11] As we will explain in issue II, *post*, the information erroneous alleged that defendant was being charged pursuant to subdivision (d)(2) of section 273.5. Defendant argues the error violated his due process right to notice of the charges and possible sentence.

[12] As to count X, corporal injury with prior convictions, it was alleged defendant used a firearm, a handgun (§ 12022.5, subd. (a)). The jury found this allegation was not true.

PROCEDURAL HISTORY

As set forth above, the information alleged as to count X, corporal injury to Ms. Martinez, that defendant had three prior convictions. It also alleged an on-bail enhancement for counts X and XI.

As to the felony counts, it was alleged defendant had one prior strike conviction, one prior serious felony enhancement, and one prior prison term enhancement.

The court granted defendant's motion to bifurcate the prior conviction allegations for count X and the enhancements, and defendant waived a jury trial. On February 16, 2017, the court found true the prior strike conviction, the sentencing enhancements, the on-bail allegation, and the three prior convictions attached to count X.

Defendant was sentenced to an aggregate term of 33 years four months.

DISCUSSION

I. Admission of Ms. Power's Prior Statements

The prosecution called Ms. Power as a witness, but she claimed her Fifth Amendment privilege and refused to testify. Thereafter, the court found she was unavailable and granted the prosecutor's motion to have Deputy Durnall testify about the statements Ms. Power made when he initially arrived at Meeks's house in response to the domestic violence dispatch. The court found Ms. Power's hearsay statements to Durnall were admissible as spontaneous statements under Evidence Code section 1240 and were not testimonial under *Crawford*.

On appeal, defendant concedes Ms. Power's statements to Deputy Durnall were spontaneous statements but argues the evidence was inadmissible testimonial hearsay under *Crawford* because Ms. Power's statements "were taken for investigatory purposes."

Defendant further argues the error was prejudicial because Ms. Power's hearsay statements constituted the only evidence to support count III, robbery, count VI, false imprisonment, and count VII, criminal threats.

A. Ms. Power's Refusal to Testify

Prior to trial, Ms. Power sent a letter to the prosecutor and recanted her original accusations against defendant.

During trial, the prosecutor repeatedly attempted to call Ms. Power as a witness, but she refused to testify. The court appointed counsel to represent her. The prosecutor offered transactional immunity, but she again refused and claimed her Fifth Amendment privilege not to testify. The court found her in contempt.

Thereafter, the prosecutor moved to introduce Ms. Power's prior statements to Deputy Durnall under the spontaneous statement exception to the hearsay rule pursuant to Evidence Code section 1240 because they were made at the scene shortly after defendant assaulted her. Defense counsel argued Ms. Power's prior statements were testimonial hearsay and inadmissible.

The court conducted an evidentiary hearing on the admissibility of Ms. Power's hearsay statements.

B. The Evidentiary Hearing

At the evidentiary hearing, Deputy Durnall testified that at 12:07 p.m., he was in Sonora and received a dispatch to respond to a location in Groveland because a neighbor reported a female was being beaten by her husband. He initially responding using lights and siren. During the drive, he was informed by the dispatcher that the suspect had left the scene, and he turned off his lights and siren.

Deputy Durnall arrived "a little under a half hour" after receiving the dispatch and was the first deputy at the scene. Ms. Power was outside the house and four other men were there. One man was holding the baby.

Deputy Durnall testified Ms. Power was the first person he contacted. She was crying and very upset. Durnall asked "where he is or where he went," referring to the suspect. Ms. Power said he left in a green Jeep with Kizziar, and he had Kizziar at

knifepoint. Durnall immediately advised the dispatcher that the suspect had left and was possibly holding a subject at knifepoint in the vehicle.

Deputy Durnall testified he looked at Ms. Power and the baby to determine their condition. Ms. Power had visible injuries on her face. He determined there was nothing that needed immediate attention and advised Ms. Power that an ambulance was on the way.

Deputy Durnall testified he asked Ms. Power to tell him what happened because he did not know what he was responding to. Durnall knew defendant had left, he had a weapon, other deputies were looking for him, and defendant had not been found. Durnall was concerned defendant could return.

Deputy Durnall testified Ms. Power was "still upset, crying, but not to where I couldn't understand what she was saying." Durnall testified, "I really didn't have to ask her a lot of questions. She just kept speaking." She spoke "openly" and he did not have to prompt her. Durnall asked occasional "clarifying" questions, like whether she remembered what hand he used to hit her. The conversation began outside the house, but she asked Durnall to go inside so she could show him what and where certain things happened.

Deputy Durnall spoke to her for about five to 10 minutes. Ms. Power was visibly upset and sobbing during the entire period.

C. The Parties' Arguments

The prosecutor argued Ms. Power's hearsay statements to Deputy Durnall were admissible as spontaneous declarations. Ms. Power was crying and visibly upset and retained that demeanor throughout Durnall's contact with her. When he asked what happened, she "basically spills" out the information for five to 10 minutes. Durnall only asked a few clarifying questions.

The prosecutor further argued Ms. Power's statements were not testimonial because Deputy Durnall was not conducting a formal investigation. The suspect was still

at large and Durnall was trying to figure out what happened, and he was relaying pertinent information to dispatch.

Defense counsel conceded Ms. Power's first statement, that defendant left and was holding Kizziar at knifepoint, was spontaneous. However, the rest of Ms. Power's statements were made in response to Deputy Durnall's questions and occurred about an hour after the incident, and there were no longer any exigent circumstances to make them spontaneous declarations.

Defense counsel argued Ms. Power's statements were also testimonial and inadmissible under *Crawford* because Deputy Durnall was investigating what happened to her, there was no longer an emergency, and the incident had ended when he interviewed her.

The court asked defense counsel whether there was still an emergency when Deputy Durnall talked to Ms. Power since Durnall learned defendant had left the scene and was holding another person at knifepoint. Counsel replied that other officers were looking for defendant, and Durnall was only investigating what happened to Ms. Power.

D. The Court's Ruling

The court made lengthy findings and held that Ms. Power's hearsay statements to Deputy Durnall were admissible as spontaneous statements and were not testimonial under *Crawford*.

> "I will find that the statement that Ms. Power made to Deputy Durnall was, in fact, a spontaneous declaration. She had just been assaulted. The testimony is that the call at dispatch was 12:07. He left immediately. He only turned his lights and sirens off because he was told that the person had left the scene. *When he gets there, however, he almost immediately learns not only had the person left the scene with somebody else and had had that other person at knifepoint. There was an emergency situation that was going on.*
>
> "*And when he asks her what happened, that was not[,] that's not a formal police interrogation. That's not I am going to take you down to the station house; we will go over this in detail. It's what happened, and she*

just starts talking. So this is about a very [*sic*] what appears to be she's injured. The baby is injured. She's just telling him in response just what happened. He isn't directing the conversation. He isn't directing this in any specific way. He's trying to make sure of what she said.

"And the issue is whether or not her statements are being made without reflection or deliberation. So she's not reflecting or deliberating. She's telling him what happened. In fact, she's the one that takes him into the house to show him where things happened, so she's leading this. He's not[,] he is not eliciting the information. She's leading him in and telling him what happened. It's not really in response to his interrogation.

"In *Cage*[13] the court goes through the factors to determine whether or not a statement is testimonial. They set forth a number of factors to consider. [T]he first is whether or not the … out-of-court statement is an out-of-court analog in purpose and form of the testimony given by witnesses at trial, and this is just in response to what happened – what happened here to determine is the emergency ongoing; do you need help; what – what happened, is not either in purpose or form the analog of testimony at trial.

"Was the purpose–this is where [defense counsel] is going, is that he's saying the emergency is over, that the cop – Officer Durnall, his purpose is to gather information for the – for the purposes of the investigation as opposed to dealing with the emergency that just took place and is taking place, and I disagree with that. *I mean, just asking what happened to figure out what is going on here so you can deal with it: Do I need to send her somewhere; do I need to take the baby to the hospital. We have the ambulance on the way. The ambulance hasn't even arrived yet, and she's just making this spontaneous statement*. So we have to look at the intent of the participants. … Officer Durnall doesn't know what happened, and he's just trying to find out what just took place here.

"Has there been sufficient time or is she, in fact, responding to questioning by law enforcement officials, while deliberate falsehood might be a criminal offense? In other words, is it are we at the police station where you're asking pointed questions? Is it an interrogation?

"This is far from an interrogation. This is really one question, and she goes on. I am persuaded by his testimony that what happened is he asked what happened, and she just went off and gave this long statement,

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[13] *People v. Cage* (2007) 40 Cal.4th 965

> that all he did was try to figure out what are you telling me. I don't understand what you're telling me here. That's where he's getting clarification, rather than asking her pointed questions to try to elicit information to prepare a report.
>
> "The Court finds that the emergency was contemporaneous. The events had just occurred. She's still injured. The ambulance hasn't arrived. There's somebody out there with another potential witness another potential victim possibly being held at knifepoint.
>
> "[The] Court finds this is not a proper formal police interrogation. I will allow the testimony." (Italics added.)

As set forth above, Deputy Durnall testified in front of the jury about his arrival at Meeks's house, and Ms. Power's statements about defendant's assault on her.[14]

E. Spontaneous Statements

Defendant concedes that Ms. Power's hearsay statements to Deputy Durnall were admissible under the spontaneous statement exception to the hearsay rule pursuant to Evidence Code section 1240. We briefly review the applicable hearsay exception in this case since it is also relevant for the testimonial analysis. (See, e.g. *People v. Chism* (2014) 58 Cal.4th 1266, 1288.)

Evidence Code section 1240 provides, in pertinent part, that evidence is "not made inadmissible by the hearsay rule" if it "[p]urports to narrate, describe, or explain an act, condition, or event perceived by the declarant" and it was "made spontaneously while the

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14 The court denied the prosecutor's request to have Ms. Power appear before the jury to refuse to testify. During the defense case, defense counsel attempted to call Ms. Power to testify that she had sent a letter and recanted her allegations against defendant. Ms. Power again refused to testify.

With the agreement of the parties, the court read the following stipulation to the jury about Ms. Power's failure to appear: " '[T]he People called Kayla Power as a witness outside the presence of the jury. She refused to answer any questions. [T]he defense called Kayla Power as a witness outside the presence of the jury. She refused to answer any questions. [¶] You may not speculate as to why Kayla Power refused to answer any questions.' "

declarant was under the stress of excitement caused by such perception." (Evid. Code, § 1240, subds. (a), (b).)

"[A] hearsay statement, even if otherwise spontaneous, is admissible only if it relates to an event the declarant perceived personally." (*People v. Phillips* (2000) 22 Cal.4th 226, 235.) " 'The foundation for this exception is that if the declarations are made under the immediate influence of the occurrence to which they relate, they are deemed sufficiently trustworthy to be presented to the jury. [Citation.]' " (*People v. Poggi* (1988) 45 Cal.3d 306, 318.)

" 'Neither lapse of time between the event and the declarations nor the fact that the declarations were elicited by questioning deprives the statements of spontaneity *if it nevertheless appears that they were made under the stress of excitement and while the reflective powers were still in abeyance*.' [Citation.]" (*People v. Poggi*, *supra*, 45 Cal.3d at p. 319, italics added in original; *People v. Brown* (2003) 31 Cal.4th 518, 541.)

"The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is ... not the nature of the statement but the mental state of the speaker. The nature of the utterance – how long it was made after the startling incident and whether the speaker blurted it out, for example – may be important, but solely as an indicator of the mental state of the declarant. [U]ltimately each fact pattern must be considered on its own merits, and the trial court is vested with reasonable discretion in the matter. [Citation.]" (*People v. Farmer* (1989) 47 Cal.3d 888, 903–904, overruled on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6; *People v. Roybal* (1998) 19 Cal.4th 481, 516.)

Whether the requirements of Evidence Code section 1240 are met is largely a question of fact within the discretion of the trial court, and " 'each fact pattern must be considered on its own merits ....' " (*People v. Riva* (2003) 112 Cal.App.4th 981, 995, fn. omitted; *People v. Poggi*, *supra*, 45 Cal.3d at p. 318.) The "foundation, or preliminary fact [required to admit a spontaneous declaration], require[s] only proof by a

preponderance of the evidence. [Citation.] In making its factual determination the trial court exercises discretion. [Citation.] If substantial evidence supports the exercise of that discretion we must uphold it. [Citation.]" (*People v. Anthony O*. (1992) 5 Cal.App.4th 428, 433–434.)

As defendant concedes, the court correctly found Ms. Power's statements were spontaneous within the meaning of Evidence Code section 1240. Deputy Durnall testified Ms. Power continued to cry as she described what happened, and he only asked a few clarifying questions.

Ms. Power's statements to Deputy Durnall were admissible under Evidence Code section 1240 because they made under the immediate influence of defendant's assault on her, and she was still upset and shaken as she described what happened.

F. Crawford, Davis, and Bryant

We now turn to the question of whether Ms. Power's hearsay statements were testimonial and inadmissible under the confrontation clause.

On appeal, we independently review whether an otherwise admissible pretrial hearsay statement was testimonial such that its admission would violate the confrontation clause. (*People v. Nelson* (2010) 190 Cal.App.4th 1453, 1466.) The erroneous admission of testimonial statements requires reversal unless the People show the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18; *People v. Rutterschmidt* (2012) 55 Cal.4th 650, 661.)

"Prior to *Crawford,* the admission of a hearsay statement under a firmly-rooted exception to the hearsay rule or when there were indicia of reliability did not violate a defendant's right of confrontation," as set forth in *Ohio v. Roberts* (1980) 448 U.S. 56, 66 (*Roberts*). (*People v. Corella* (2004) 122 Cal.App.4th 461, 467.)

In *Crawford*, the United States Supreme Court held that the confrontation clause precludes the use of "testimonial" hearsay against the defendant in a criminal trial, unless the declarant is unavailable, and the defendant had a prior opportunity for cross-

examination. (*Crawford*, *supra*, 541 U.S. at p. 68.) *Crawford* did not provide a comprehensive definition of "testimonial," but explained the term "applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Ibid*.)

After *Crawford*, a "nontestimonial" hearsay statement continues to be governed by the *Roberts* standard, such that admission of a hearsay statement does not violate the confrontation clause if the statement "bears adequate 'indicia of reliability,' " and it either "falls within a firmly rooted hearsay exception" or is cloaked with "particularized guarantees of trustworthiness." (*Roberts*, *supra*, 448 U.S. at p. 66, fn. omitted; *Crawford*, *supra*, 541 U.S. at pp. 42, 68; *People v. Corella*, *supra*, 122 Cal.App.4th at p. 467.)

"The hearsay exception for spontaneous declarations is among those 'firmly rooted' exceptions that carry sufficient indicia of reliability to satisfy the Sixth Amendment's confrontation clause. [Citation.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 529; *People v. Brown*, *supra*, 31 Cal.4th at p. 542.)

In *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*), the court determined "when statements made to law enforcement personnel during a 911 call or at a crime scene are 'testimonial' and thus subject to the requirements of the Sixth Amendment's Confrontation Clause." (*Id*. at p. 817.) *Davis* addressed two cases with different factual situations. In the first case, a domestic disturbance victim called 911 and described the defendant's actions to the operator as she was being assaulted. In response to the operator's specific questions, the victim reported the defendant's name, described how he was attacking her, and identified her location. The victim started to ramble, and the 911 operator admonished her to " 'Stop talking and answer my questions.' [Citation.]" (*Id*. at pp. 817–818.) As the call progressed, the victim said the defendant had just run out the door and was leaving in a car. At trial, the victim did not appear, and the prosecution introduced the tape recording of the 911 call. (*Id*. at pp. 818–819.)

Davis also addressed the facts of a companion case, *Hammon v. State* (Ind. 2005) 829 N.E.2d 444, where officers responded to a domestic disturbance call at the home where the defendant and his wife lived. When they arrived, the defendant's wife was on the front porch and appeared frightened, but she said nothing was wrong. The defendant was inside the house and said they argued, but everything was fine. When the officers spoke again to his wife, the defendant tried to interfere in the conversation and became angry when the officers separated them. The officers interviewed the victim separately about the incident, and she signed a written battery affidavit about how the defendant attacked her. The victim refused to appear at trial, and the prosecution introduced the testimony of the officers who interviewed her. (*Davis*, *supra*, 547 U.S. at pp. 819–821.)

Davis explained that while *Crawford* held that " 'interrogations by law enforcement officers fall squarely within [the] class' of testimonial hearsay, we had immediately in mind (for that was the case before us) interrogations solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator. The product of such interrogation, whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, is testimonial." (*Davis*, *supra*, 547 U.S. at p. 826.)

Davis expanded upon the meaning of "testimonial" and clarified that not all those questioned by the police are witnesses, and not all interrogations by law enforcement officers are subject to the confrontation clause:

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Davis*, *supra*, 547 U.S. at p. 822, fn. omitted.)

Davis relied on this definition and held that in the first case, the victim's statements to the 911 operator were admissible and not testimonial under *Crawford*. The circumstances of the 911 operator's "interrogation" of the victim "objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency. [The victim] simply was not acting as a *witness*; she was not *testifying*. What she said was not 'a weaker substitute for live testimony' at trial .... No 'witness' goes into court to proclaim an emergency and seek help." (*Davis, supra*, 547 U.S. at p. 828.) The victim was "speaking about events *as they were actually happening*, rather than 'describ[ing] past events,' [citation]." (*Id*. at p. 827.) Moreover, the questions posed by the 911 operator did not turn the victim's statements into testimonial evidence because "the nature of what was asked and answered … again viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn … what had happened in the past. That is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon. [Citation.]" (*Ibid*.)

In contrast, *Davis* held the victim's statements to the police officers in the companion case of *Hammon* were testimonial and inadmissible in the absence of the victim's trial testimony. The victim told the officers that things were fine. Her hearsay statements about the assault were ultimately given through a written affidavit as part of an investigation into possible past criminal conduct, and there was no emergency or immediate threat to the victim. (*Davis, supra*, 547 U.S. at pp. 827, 819–821, 829–830.) The officers did not ask questions to determine " 'what [was] happening,' but rather 'what happened.' Objectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime – which is, of course, precisely what the officer *should* have done." (*Id*. at p. 830.) "It is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct" and "[t]here was no emergency in progress ...." (*Id*. at p. 829.)

Davis acknowledged the interview in *Hammon* was less formal than stationhouse questioning addressed in *Crawford* but held "[i]t was formal enough" and "[s]uch statements under official interrogation are an obvious substitute for live testimony, because they do precisely *what a witness does* on direct examination; they are inherently testimonial." (*Davis, supra*, 547 U.S. at p. 830, fn. omitted.)

In *Michigan v. Bryant* (2011) 562 U.S. 344 (*Bryant*), officers found a man lying in a gas station parking lot. He was bleeding from a gunshot wound. While waiting for medical personnel to arrive, the officers asked the victim what happened, who shot him, and where the shooting occurred. The victim answered questions for five to 10 minutes until emergency personnel arrived and identified the perpetrator. He died a few hours later. At the defendant's murder trial, the officers testified about the victim's hearsay statements. (*Id.* at p. 349.)

Bryant held the victim's statements to the officers were not testimonial. In doing so, *Bryant* expanded on the principle that a statement is testimonial if made "with a primary purpose of creating an out-of-court substitute for trial testimony," and the test was objective. (*Bryant, supra*, 562 U.S. at p. 358.)

> "An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the 'primary purpose of the interrogation.' The circumstances in which an encounter occurs – e.g., at or near the scene of the crime versus at a police station, during an ongoing emergency or afterwards – are clearly matters of objective fact. The statements and actions of the parties must also be objectively evaluated. That is, the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred. [¶] … [¶] This logic is not unlike that justifying the excited utterance exception in hearsay law…. An ongoing emergency has a similar effect of focusing an individual's attention on responding to the emergency." (*Id.* at pp. 360–361, fns. omitted.)

Bryant rejected the lower court's interpretation that *Davis* held the victim's statements were not made during an ongoing emergency because the defendant had stopped assaulting the victim and left the premises. (*Bryant, supra*, 562 U.S. at p. 363.) While a domestic violence case may have "a narrower zone of potential victims than cases involving threats to public safety," the determination of whether an emergency "that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and the public may continue. [Citation.]" (*Id*. at pp. 363–364.)

Bryant held the circumstances of the encounter and officers' questioning of the victim "indicate that the 'primary purpose of the interrogation' was 'to enable police assistance to meet an ongoing emergency,' " and the victim's statements were not testimonial. (*Bryant, supra*, 562 U.S. at pp. 377–378.) The officers did not know the identities of the victim or the assailant, where the shooting had occurred, or whether the assailant posed a continuing threat to the victim or others. (*Id*. at pp. 374–376.) The statements were not made in a formal setting, the victim was in distress, and no signed statement was produced. The officers asked the questions "in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion" (*id*. at p. 366) and "were the exact type of questions necessary to allow the police to ' "assess the situation, the threat to their own safety, and possible danger to the potential victim" ' and to the public, [citation] …." (*Id*. at p. 376.) The victim's responses indicated the shooter's whereabouts were unknown and there was "no reason to think that the shooter would not shoot again if he arrived on the scene." (*Id*. at p. 377.) "Nothing in [the victim's] responses indicated to the police that … there was no emergency or that an emergency had ended." (*Ibid*.) The officers knew the suspect had a gun so the suspect's absence from the scene "was not necessarily sufficient to end the threat …." (*Id*. at p. 373.)

G. Application of Crawford

In *People v. Blacksher* (2011) 52 Cal.4th 769 (*Blacksher*), the defendant shot and killed his sister and her son at the home of the defendant's mother. The defendant's mother was too ill to testify at trial, and the court admitted the statements she made to the first officer who arrived at the house after the murder. (*Id.* at pp. 781–784.) *Blacksher* held the mother's statements about what happened at the house were admissible as spontaneous utterances and were not testimonial. (*Id*. at pp. 809–811, 816.) The officer arrived within four minutes of the 911 call, the bodies were still in the house, and the witness did not know if the defendant was still present. During a 10- to 15-minute conversation, the officer asked her about the shooting, what the defendant was wearing, and whether he was armed. The officer determined the defendant had fled, but he was armed with the murder weapon, and his motive and whereabouts were unknown. The officers were trying to assess the emergency and determine the gunman's whereabouts. (*Id*. at p. 816.) *Blacksher* held the witness's statements were not testimonial:

> "It was objectively reasonable to believe that an armed shooter remained at large and presented an emergency situation. [¶] Objectively, the primary purpose of both [the witness and the officer] was to deal with that emergency, not to create an out-of-court substitute for trial testimony. Instead, the primary purpose for both of them was to determine defendant's whereabouts and evaluate the nature and extent of the threat he posed." (*Id*. at p. 816.)

Blacksher further held the witness was "greatly upset" during the discussion with the officer, which occurred in an open setting in a yard and under chaotic conditions. The situation was "much more similar to the parking lot questioning in *Bryant* than the more calm and formal circumstances of *Crawford* and *Hammon* …." (*Blacksher*, *supra*, 52 Cal.4th at pp. 816–817, fn. omitted.)

In *People v. Romero* (2008) 44 Cal.4th 386, the defendant and another man attacked the victim with an ax. The police responded to the scene, and the "agitated victim" was injured, yelling, and very upset. The victim described the suspects and

explained what happened. Within five minutes, the officers detained the suspects and the victim identified them. (*Id*. at p. 420.) *Romero* held the victim's statements and identifications were not testimonial.

> "The statements provided the police with information necessary for them to assess and deal with the situation, including taking steps to evaluate potential threats to others by the perpetrators, and to apprehend the perpetrators. The statements were not made primarily for the purpose of producing evidence for a later trial and thus were not testimonial. The same is true of the statements pertaining to identification. The primary purpose of the police in asking [the victim] to identify whether the detained individuals were the perpetrators, an identification made within five minutes of the arrival of the police, was to determine whether the perpetrators had been apprehended and the emergency situation had ended or whether the perpetrators were still at large so as to pose an immediate threat." (*Id*. at p. 422.)

In *People v. Corella*, *supra*, 122 Cal.App.4th 461, the defendant's wife called 911 and reported the defendant assaulted her. When the first officer arrived at the house, she found the victim was crying, distraught, and in physical pain. The victim explained the defendant argued with her and punched in her in the head and ribs. (*Id*. at p. 465.) *Corella* held the victim's statements to the 911 operator and the officer about the circumstances of the assault were admissible as spontaneous statements under Evidence Code section 1240 and were not testimonial. (*Id.* at p. 466.)

> "*Preliminary questions asked at the scene of a crime shortly after it has occurred do not rise to the level of an 'interrogation*.' Such an *unstructured interaction* between officer and witness bears no resemblance to a formal or informal police inquiry that is required for a police 'interrogation' as that term is used in *Crawford*. [Citations.]
>
> "Moreover, it is difficult to identify any circumstances under which [an Evidence Code] section 1240 spontaneous statement would be 'testimonial.' The rationale of the spontaneous statement exception to the hearsay rule is that the utterance must be made without reflection or deliberation due to the stress of excitement. [Citation.] [The victim's] statements were ultimately used in a criminal prosecution, but statements made without reflection or deliberation are not made in contemplation of

their 'testimonial' use in a future trial." (*Id*. at p. 469, italics added, fn. omitted.)

H. Analysis

Defendant argues the entirety of Ms. Power's statements to Deputy Durnall were testimonial because she made the statements under the same circumstances that were addressed in *Hammon*, the companion case in *Davis*, *supra*, 547 U.S. at pages 819 through 821. Defendant asserts the acts of domestic violence had ended before Durnall arrived; he knew before he got there that the suspect had already left the scene; Ms. Power's statements were simply a narrative of past events; she was no longer in danger; there was no crime in progress; and the only purpose of the interview was to get the details as part of the investigation into defendant's criminal conduct. Defendant acknowledges that Ms. Power disclosed defendant left with Kizziar at knifepoint, but there was no ongoing emergency since Kizziar never called 911 for help and other officers were looking for defendant and Kizziar.

We find Ms. Power's narrative statements to Deputy Durnall, which were admissible under the spontaneous statement exception to the hearsay rule, were not testimonial under the confrontation clause or *Crawford*. Defendant's reliance on *Davis* and *Hammon* discounts the primary purpose principle and the objective analysis that is required to make this determination, as explained in *Bryant* and *Blacksher*. As Durnall drove to Meeks's house, he was advised by the dispatcher that the suspect was no longer at the scene and turned off his lights and siren. At the evidentiary hearing, Durnall testified that when he arrived at the house, Ms. Powers was the first person he contacted, and he immediately noticed the injuries to her face. She was crying and very upset, and Durnall asked where the suspect was. Ms. Power said he left in a green Jeep with Kizziar, and he had Kizziar at knifepoint.

At that point, Deputy Durnall was aware the suspect had beaten Ms. Power and possibly a baby, he was armed with a deadly weapon, and a second person was in danger.

He advised dispatch and knew other deputies were looking for defendant and Kizziar. However, there is no evidence that he was informed that a deputy had contacted Kizziar or that he was no longer in danger. In addition, defendant was never apprehended that day and was arrested several days later.

Defendant asserts that *Bryant* does not control this case since it distinguished between domestic violence situations and other emergencies, Ms. Power was a domestic violence victim, and the crime was over when Deputy Durnall arrived so that she was only reporting about a past crime and not an ongoing emergency. (*Bryant*, *supra*, 562 U.S. at p. 359.) However, Durnall could not ignore the initial statement made by Ms. Power when he arrived – that defendant was holding another person at knifepoint. It was thus objectively reasonable for Durnall to broadly ask Ms. Power what happened because he did not know exactly what he was responding to, since a domestic violence call had turned into an emergency situation with a deadly weapon and a second victim. Durnall testified Ms. Power was injured, crying, and distraught, and launched into a narrative about defendant's conduct at the house, how he beat her, and that he pulled a box cutter and told her they were going to Kizziar's vehicle.

Deputy Durnall thus learned about the precise nature of the suspect's weapon and that he was willing to use it. Durnall was never advised whether defendant and/or Kizziar had been found, and there was a possibility that defendant could have returned to the scene since he had been frustrated in his attempt to force Ms. Power to leave with him.

In contrast to *Hammon*, where both the alleged suspect and victim denied that anything was wrong, Ms. Power was visibly injured, the child appeared to have some type of injury, and Ms. Power immediately disclosed that she had been assaulted. "Even when a threat to an initial victim is over, a threat to the first responders and the public may still exist." (*Blacksher*, *supra*, 52 Cal.4th at p. 814.) Based on an objective standard, the primary purpose for both the deputy and the declarant was to briefly

summarize defendant's actions and his willingness to use a deadly weapon to force someone to act. Ms. Power's narrative about what happened was highly relevant for those deputies who were trying to find Kizziar and defendant.

As in *Bryant, Blacksher*, and *Corella*, Deputy Durnall asked the victim a preliminary question at the scene of the crime shortly after it had occurred, in an unstructured interaction that did not bear any resemblance "to a formal or informal police inquiry that is required for a police 'interrogation' as that term is used in *Crawford*. [Citation.]" (*People v. Corella, supra,* 122 Cal.App.4th at p. 469.) Ms. Power's narrative statements provided Durnall with information that he could convey to the other deputies "for them to assess and deal with the situation, including taking steps to evaluate potential threats to others b the perpetrator[], and to apprehend the perpetrator[]." (*People v. Romero, supra*, 44 Cal.4th at p. 422.) While Durnall eventually went into the house at Ms. Power's insistence and confirmed defendant was not there, his whereabouts were unknown and the possibility existed that he could return.

Also as in *Corella*, Ms. Power's hearsay statements were admissible under Evidence Code section 1240: "The rationale of the spontaneous statement exception to the hearsay rule is that the utterance must be made without reflection or deliberation due to the stress of excitement. [Citation.] [The victim's] statements were ultimately used in a criminal prosecution, but statements made without reflection or deliberation are not made in contemplation of their 'testimonial' use in a future trial." (*People v. Corella, supra,* 122 Cal.App.4th at p. 469, fn. omitted.)

While Ms. Power's verbal statements were not testimonial, a different conclusion must be reached about the form that she filled out before Deputy Durnall left the scene. Durnall testified he offered a form to her for a domestic violence victim. Ms. Power accepted the form and used it to report the nature and extent of her injuries. This aspect of Durnall's interaction with Ms. Power is similar to the situation found testimonial in *Hammon*, where the victim's hearsay report about the assault were ultimately given

through a written affidavit. (*Davis*, *supra*, 547 U.S. at pp. 827, 829–830.) However, Durnall's testimony about Ms. Power's written report was not prejudicial in light of her verbal statements about defendant's assault, and Durnall's observations of the injuries to her face.

The court properly overruled defendant's objections and Ms. Power's verbal statements to Deputy Durnall were admissible.

II. Defendant was Properly Sentenced in Count X

Defendant contends the court improperly imposed the sentence for count X, corporal injury by threats or violence to Ms. Martinez resulting in a traumatic condition, with three prior convictions, by relying on the elevated sentencing triad set forth in section 273.5, subdivision (f)(1). Defendant argues that while the information alleged the existence of three prior convictions as required by that subdivision, and the court found those allegations true, the information alleged the wrong statutory subdivision and he did not receive adequate notice of the possibility of a higher sentence in violation of his due process rights.

In order to address these arguments, we must review the various amendments to section 273.5, the subdivisions regarding the elevated sentencing triad, the procedural history of this case, the court's discussions with the parties prior to jury selection, and the applicable legal authorities.

A. Section 273.5

Defendant was charged and convicted in count X of violating section 273.5, subdivision (a), willful infliction of corporal injury, which states:

> "Any person who willfully inflicts corporal injury resulting in a traumatic condition upon a victim described in subdivision (b) is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for *two, three, or four years*, or in a county jail for not more than one year, or by a fine of up to six thousand dollars ($6,000), or by both that fine and imprisonment." (Italics added.)

1. The Addition of the Enhanced Sentencing Triad

In 1999, section 273.5 was amended to add subdivision (e), which stated that a person convicted of violating subdivision (a) would face an enhanced sentencing triad if he or she had prior convictions for violating section 273.5 or other enumerated statutes. (§ 273.5, subd. (e), added by Stats. 1999, ch. 660, § 2 & ch. 662, § 9.5.)

In 2003, section 273.5, subdivision (e)'s provisions for the enhanced sentencing triad were amended. Subdivision (e)(1) stated the circumstances for imposing a higher sentence if the defendant was convicted of violating section 273.5 or other enumerated statutes, as previously provided. Subdivision (e)(2) was added to include a prior conviction for another enumerated statute which also would trigger application of the higher sentencing triad. (§ 273.5, amended by Stats. 2003, ch. 262, § 1.)

2. The 2012 Statute

As of 2012, section 273.5, subdivision (e)(1) stated:

> "Any person convicted of violating this section for acts occurring within seven years of a previous conviction under subdivision (a), or subdivision (d) of Section 243, or Section 243.4, 244, 244.5, or 245, shall be punished by imprisonment in a county jail for not more than one year, or by imprisonment in the state prison for two, four, or five years, or by both imprisonment and a fine of up to ten thousand dollars ($10,000).

Subdivision (e)(2) stated:

> "Any person convicted of a violation of this section for acts occurring within seven years of a previous conviction under subdivision (e) of Section 243 shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to ten thousand dollars ($10,000), or by both that imprisonment and fine." (See Stats. 2012, ch. 867, § 16).

3. The 2013 Amendment

In 2013, section 273.5 was again amended and likely led to the pleading error in this case.

Subdivision (a) was amended to refer to newly-added subdivision (b), describing the persons who qualified as victims of the offense. Subdivision (b) defined the victims to include former or current spouses, cohabitants, or fiances, or the mother or father of the offender's child. (§ 273.5, amended by Stats. 2013, ch. 763, § 1.)

As a result of adding subdivision (b), the rest of the subdivisions were redesignated. Former subdivision (d), defining whether a victim was the mother or father of a child, was redesignated as subdivision (e) and only addressed parentage. (§ 273.5, amended by Stats. 2013, ch. 763, § 1.)

As relevant to this case, former subdivisions (e)(1) and (e)(2), which set forth the circumstances for the enhanced sentencing triad, were redesignated as subdivisions (f)(1) and (f)(2), without substantive changes, and again provided the imposition of an enhanced sentencing triad upon proof of certain prior convictions. (§ 273.5, amended by Stats. 2013, ch. 763, § 1.)

4. The Applicable Version of Section 273.5

At the time of this case, section 273.5, subdivision (f)(1) contained the same language as in the 2012 and 2013 statutes. It states:

> "Any person convicted of violating this section for acts occurring within seven years of a previous conviction under subdivision (a), or subdivision (d) of Section 243, or Section 243.4, 244, 244.5, or 245, shall be punished by imprisonment in a county jail for not more than one year, or by imprisonment in the state prison for *two, four, or five years*, or by both imprisonment and a fine of up to ten thousand dollars ($10,000)." (Italics added.)

Subdivision (f)(2) states:

> "Any person convicted of a violation of this section for acts occurring within seven years of a previous conviction under subdivision (e) of Section 243 shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to ten thousand dollars ($10,000), or by both that imprisonment and fine."

B. The Procedural History of the Charges Against Defendant

Defendant was initially charged by a complaint with multiple offenses arising from his kidnapping and use of the boxcutter on Damian Kizziar, and his burglary, robbery, and assault upon Ms. Powers. Defendant waived a preliminary hearing on those charges, he entered a general time waiver, and he was released on bail.

While defendant was on bail, he committed the assault against Ms. Martinez. His bail was revoked, he was taken into custody, remained in jail during the rest of the proceedings, and a new and separate complaint was filed against him. The separate complaint alleged in count I that defendant willfully and unlawfully inflicted corporal injury resulting in a traumatic condition to her in in violation of section 273.5, subdivision (a).

Also, as to that count, the complaint further alleged pursuant to section 273.5, subdivision "(e)(2)" that defendant had, "within the seven years prior to the acts constituting a violation of this subsection, suffered the following prior conviction(s) of … Section 273.5…." The complaint alleged defendant had one felony conviction and two misdemeanor convictions for violating section 273.5 in 2009 and 2011 and identified the counties and case numbers for those prior convictions.

Defendant was also charged with false imprisonment by violence of Ms. Martinez, with an onbail enhancement, a prior strike conviction, and a prior prison term enhancement.

After the complaint was filed in the second case, defendant pleaded not guilty and refused to waive time throughout the remainder of the two cases.

On November 30, 2016, the court held the preliminary hearing on the charges based on Ms. Martinez, and defendant was held to answer. At the beginning of the hearing, the prosecutor asked the court to take judicial notice of the case numbers for the prior domestic violence convictions from the 2009 cases.

C. The Consolidated Information

Thereafter, the court granted the prosecution's motion to consolidate the two separate cases against defendant.

On January 23, 2017, the consolidated amended information was filed against defendant that included all the offenses committed against Ms. Powers, Kizziar, and Ms. Martinez, upon which he was tried in this case.

In count X, the consolidated amended information alleged defendant committed a felony violation of section 273.5, subdivision (a) against Ms. Martinez, using the same language as the complaint: that he willfully and unlawfully inflicted corporal injury resulting in a traumatic condition against Ms. Martinez, a person who was in a dating relationship with him.

Count X also included the following allegations in the information, that were identical to those used in the prior complaint:

> "It is further alleged, pursuant to subdivision 273.5*(e)(2)*, that the defendant has, within the seven years prior to the acts constituting a violation of this subdivision, suffered the following prior conviction(s) of … Section 273.5…." (Italics added.)

The information alleged as to count X that defendant had three prior convictions, again using the same language as the prior complaint: a violation of section 273.5 on May 19, 2011, in Mariposa County and two misdemeanor violations of section 273.5 on September 14, 2009, in Tuolumne County.

The information further alleged as to count X and the other felony offenses, that defendant had one prior strike conviction.

1. Erroneous Citation to Subdivision (e)

As we will discuss below, based on the allegations in the consolidated information, the People were apparently attempting to allege as to count X, that defendant had prior convictions for violating 273.5 to impose the enhanced sentencing triad. However, the information erroneously made this allegation under

subdivision (e)(2). As explained above, subdivision (e) had been amended and re-designated to address the parentage of a victim under section 273.5, and subdivision (f) now contains the requirements for the enhanced triad.

The information's charging language was identical to that stated in subdivision (f), alleged three prior convictions for violating section 273.5, and was consistent with the enhanced triad provided in subdivision (f)(1).

Section 273.5, subdivision (f)(2) (previously subdivision (e)(2)) only applies for an enhanced triad if the defendant's prior conviction was for violating section 243, subdivision (e), which was not alleged as to count X.

D. The First Day of Trial

The record before this court does not indicate there were any plea offers, discussions, or negotiations at any time in this case.

Prior to trial, the prosecution filed a motion in limine to impeach defendant's possible trial testimony with his prior felony conviction for violating section 273.5 in 2011 and the conduct underlying his two misdemeanor violations of section 273.5 in 2009, the same prior convictions alleged as to count X. The prosecution also sought to introduce those same prior domestic violence convictions pursuant to Evidence Code section 1109.

On February 8, 2017, the court convened the scheduled first day of trial. The minute order for that date states that defendant was present with his attorney. In the reporter's transcript, the court stated it was meeting with the prosecutor and defense counsel in chambers, outside the presence of the prospective jurors "and without the defendant." The court asked defense counsel if he wanted "defendant in chambers for this?" Defense counsel said no.

The court reviewed the prosecution's motion in limine to impeach defendant's trial testimony with his prior convictions. Defense counsel said he did not expect defendant to testify. The court decided to address defendant's prior convictions anyway.

The court found defendant's prior felony conviction for violating section 273.5 was an offense of moral turpitude and could be used for impeachment, and the conduct underlying his misdemeanor convictions could also be used for impeachment if he testified.

The court asked the prosecutor about the admission of defendant's prior acts of domestic violence pursuant to Evidence Code section 1109. The prosecutor pointed out that his motion in limine identified defendant's three prior convictions for violating section 273.5. The court held such evidence was admissible, and then discussed how it would be introduced for purposes of Evidence Code section 1109.

Defense counsel objected to the court's decision that defendant's conduct underlying his two misdemeanor violations of section 273.5 could be used for impeachment of his possible trial testimony. Counsel again said he did not expect defendant to testify but argued the evidence about the prior misdemeanor offenses was more prejudicial than probative. Counsel stated that he would not object to the use of the felony conviction because it was admissible for impeachment. The court overruled defendant's objections to the proposed impeachment.

1. The Court's Discussion of the Sentencing Triad

After the court addressed the impeachment issues, it turned to the allegations of the consolidated information. The following exchange occurred:

> "THE COURT: [T]here are … when we read the Information to the jury, I will go through and line out anything that is not part of the – for example, all the notice provisions, I will go and line that out so those are not read to the jury. I am going to have to figure out how –there's one count that's [a] person present … that's Count 4 [burglary]…. [¶] … [¶]
>
> "THE COURT: All right. *Then we come to the issue of his priors. It is alleged as to Count 10 that he has these priors. Now, as I understand it on [section] 273.5, the priors change the triad.*
>
> "[THE PROSECUTOR]: *Correct.*

"THE COURT: *Really, that's a sentencing allegation.* [¶] *But … the People have to prove those—*

"[THE PROSECUTOR]: *Correct.*

"THE COURT: … to the trier of fact. So he's going to have to decide whether he wants a trial by this jury on those priors. Then he's also going to have to decide how he wants to handle the strike prior and his prison priors as well as the [on-bail] allegation.

"[DEFENSE COUNSEL]: Your Honor, my thought was, if it works for the Court, to bifurcate that issue. I will make sure my client is okay with having that not done by the jury. I don't see any benefit to ask the jury that.

"THE COURT: The reason I raise it is he needs to decide that before it gets read to the jury.

"[DEFENSE COUNSEL]: I will have a quick chat with him.

"THE COURT: If he wants to bifurcate that, I will remove that. He has a jury trial right. He also needs to decide whether he will waive [a] jury on that. I will take—because I think he has a prior. *In fact, I am sure he has a right to a jury trial by the same jury on the priors, including the [section] 273.5 priors—*

"[THE PROSECUTOR]: Correct.

"THE COURT: -- prior domestic violence priors, and he has a right to a trial by jury on the [section] 12022.1 enhancement. So all of those issues he has to decide, one, whether he wants to bifurcate them from the substantive offenses, and two, whether or not you want a jury trial on those…

"[DEFENSE COUNSEL]: We definitely want to bifurcate. I need to check with him for the necessity of keeping the jury." (Italics added.)

The court granted defense counsel's request to bifurcate the prior conviction allegations.

2. Further Pretrial Discussions

The record implies the court was still meeting with the parties in chambers when the bailiff advised the court there were security concerns about defendant. The court

granted the bailiff's request to place leg restraints on defendant during the trial, and defense counsel's request the restraints would not be visible to the jury.

After a brief recess, the court stated that it would begin voir dire, and referred to a discussion it had with the attorneys in chambers about whether to dismiss a certain prospective juror. While the court did not clarify the matter, it appears the proceedings had now moved into the courtroom.

The court advised defense counsel that it had prepared a redacted information to read to the jurors. The following exchange occurred:

> "THE COURT: Mr. Beyersdorf [defense counsel], we discussed in chambers whether the defendant wants to waive [a] jury on the prior allegations[s]. The Court has previously granted your motion to bifurcate on the issue of the priors. At this point what is the defendant's pleasure with regard to the priors?
>
> "[DEFENSE COUNSEL]: Your Honor, we would respectfully request – we won't be waiving a right to a jury on the bifurcated issues. My client and I are going to talk some more. At some point we may. If and when we get to that point, we may change that."

The court clarified the prior convictions included a five-year prior serious felony enhancement, prior prison term enhancements, and a prior strike conviction. The court said there were priors "on the [section] 273.5," and the prosecutor agreed.

The court asked the clerk to remind him not to release the jurors after the verdicts were returned since they might be required for the bifurcated trial on the prior convictions.

The court then conducted voir dire, the jury was selected and sworn, and the prosecutor began the case-in-chief. Defendant did not testify at trial, and the prior convictions were not introduced under Evidence Code section 1109.

E. Defendant's Waiver of a Jury Trial on the Prior Conviction Allegations

After the jury returned the verdicts on the substantive offenses, the court asked the jurors to return to the jury room.

The court asked defense counsel whether defendant wanted a jury trial on the prior conviction allegations. Defense counsel said defendant wanted a court trial and would waive a jury trial.

The court then advised defendant of his right to a jury trial on the prior conviction allegations that included a prior strike conviction, "some prior domestic violence convictions," a prior prison term enhancement, and a prior serious felony enhancement. The court asked defendant if he understood that he had a right to a jury trial "on the prior conviction allegations and the other allegations in the case," and defendant said yes. The court asked if he waived his right to a jury trial on "the prior conviction allegations and the other allegations in the case," and defendant again said yes.

The court continued with the entirety of the requisite advisements, and found defendant had entered a knowing, intelligent, and voluntary waiver of his right to a jury trial. Thereafter, the court released the jury.

The court later conducted a bench trial on the prior conviction allegations, reviewed the entirety of the prosecution's documentary evidence, and found the allegations true.

F. The Bench Trial on the Prior Conviction Allegations

At the bench trial on the prior conviction allegations, the court stated the People had the burden to prove the prior domestic violence convictions attached to count X, the prior strike conviction, and the other allegations. The prosecutor introduced extensive documentary exhibits and the court found the allegations true.

G. The Sentencing Hearing

As explained above, a violation of section 273.5, subdivision (a) carries a triad of two, three, or four years. Upon proof of the requisite prior convictions, section 273.5, subdivision (f)(1) carries an enhanced triad of two, four, or five years.

The probation report recommended that for count X, the court impose one year, representing one-third the midterm of three years, pursuant to section 273.5, subdivision (a), and double that term to two years as the second strike term.

The prosecutor filed a sentencing statement that as to count X, defendant should be sentenced to one year four months, representing one-third the midterm of four years, specifically citing to section 273.5, subdivision (f), and double the term to two years eight months as the second strike term.

At the sentencing hearing, the court initially followed the probation report for count X and imposed a consecutive sentence of one year, representing one-third the midterm of three years under section 273.5, subdivision (a), and doubled that sentence to two years as the second strike term.

The prosecutor objected:

> "Count 10 was a [section] 273.5(f) and the Court found that the prior is true. So it is a two, four, five, so one-third the mid-term would be one year four months."

The court said the probation report was incorrect since it identified count X as a violation of section 273.5, subdivision (a). The court started to look at the verdict forms. The prosecutor said it would not be in the verdict because defendant bifurcated the prior conviction allegations, including the domestic violence offenses, and the court found them true.

> "THE COURT: I'm looking at the consolidated information…. Count 10, it does say – it says [section] 273.5 subdivision A.
>
> "[THE PROSECUTOR]: It does say A, but it is further alleged pursuant to subdivision 273.5(e)(2) the defendant has, within the seven years prior to the acts, suffered the following convictions, and those were three convictions – prior convictions for [section] 273.5, and the Court did find those true, so that elevates the triad."

The court asked the prosecutor why he did not put that in his sentencing statement. The prosecutor pointed out that it was included in the document.

"THE COURT: … Mr. Beyersdorf [defense counsel], it is F and I did find the priors true. They have to be within seven years, these.

"[DEFENSE COUNSEL]: Your Honor, just a quick note and then I would submit on that. [¶] *You did find the priors true, but it was charged as an A count.*

"THE COURT: Yeah, but that is a sentencing – once the priors are found true, it is a sentencing question. I don't … have any problem with the charging language because it is alleged and *they have got it alleged under E2, which is not correct. It has been changed to F. It is actually F1, [section] 273.5, which makes it a two, four, five. So it would add an additional four months to the calculation*." (Italics added.)

The court clarified the three prior domestic violence convictions occurred within seven years of the current offense.

The court sentenced defendant for count X to a consecutive term of one year four months (one-third the midterm of four years) pursuant to section 273.5, subdivision (f)(1), and doubled that term to two years eight months as the second strike sentence.

H. Due Process and Pleading Errors

Defendant contends his due process rights were violated when he was sentenced in count X because he did not receive notice that he faced an enhanced sentencing triad since the information erroneously cited the nonexistent subdivision (e)(2) instead of the applicable subdivision (f)(1) of section 273.5.

"A defendant has a constitutional due process right to be advised of the charges against him to have a reasonable opportunity to prepare and present a defense. [Citations.] As such, a defendant may not be convicted of an offense, which is neither specifically charged in the accusatory pleading nor necessarily included within a charged offense. [Citation.] Further, a defendant has a right to fair notice of the specific sentence enhancement allegations that will be relied upon to increase punishment for his crimes. [Citations.]" (*People v. Wilford* (2017) 12 Cal.App.5th 827, 837 (*Wilford*).)

"Adequate notice to the defendant of the offense with which he [or she] is charged is not determined solely by the charging statute. A reference to an incorrect penal statute can be overcome by factual allegations adequate to inform the defendant of the crime charged. [Citations.]" (*People v. Haskin* (1992) 4 Cal.App.4th 1434, 1439.)

"California's liberal pleading rules provide that a felony complaint is sufficient 'if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused.' (Pen. Code, § 952.) There is 'no requirement that the statute which the accused is charged with violating be designated by number, and *even a reference to the wrong statute has been viewed of no consequence* ....' (*People v. Schueren* (1973) 10 Cal.3d 553, 558 ….) A mistake in designating the statute on which a charge is based or in naming an offense is ' "immaterial unless the defendant is misled thereby ...." ' (*People v. Winning* (1961) 191 Cal.App.2d 763, 768 ….) Consistent with this authority, we may not conclude that a complaint is insufficient, or set aside a guilty plea or sentence unless we first determine that a 'defect or imperfection in matter of form' has '*prejudice[d] a substantial right of the defendant upon the merits*.' (Pen. Code, § 960.)" (*People v. Ramirez* (2003) 109 Cal.App.4th 992, 999, italics added; *People v. Amperano* (2011) 199 Cal.App.4th 336, 343.)

"[I]t is clear that a valid accusatory pleading need not specify by number the statute under which the accused is being charged. [Citations.]" (*People v. Thomas* (1987) 43 Cal.3d 818, 826 (*Thomas*).) "Given that a specific statutory enumeration is not a prerequisite for a valid accusatory pleading under section 952, it is unremarkable that we have held 'the specific allegations of the accusatory pleading, rather than the statutory definitions of offenses charged, constitute the measuring unit for determining what

offenses are included in a charge.' [Citation.] More importantly, 'even a reference to the wrong statute has been viewed of no consequence' " when the defendant has not been prejudiced by the error. (*Id*. at pp. 826–827.)

Thus, "a variance between the information and sentence generally does not offend due process unless a defendant is misled *to his prejudice* in presenting a defense. [Citation.]" (*Wilford*, *supra*, 12 Cal.App.5th at p. 837, italics added.) "An erroneous reference to a statute in a pleading is of no consequence provided the pleading adequately informs the accused of the act he [or she] is charged with having committed. [Citations]" (*People v. Ellis* (1987) 195 Cal.App.3d 334, 339.)

I. Mancebo and Tardy

Defendant's due process argument is based on *People v. Mancebo* (2002) 27 Cal.4th 735 (*Mancebo*), where the defendant was charged with committing forcible sex offenses against two victims. It was further alleged that he was subject to sentencing under the "One Strike" law based on, among other things, the use of a firearm. It was also alleged that he personally used a firearm in the commission of the sexual offenses. He was convicted, and the enhancements were found true. (*Id*. at p. 740.) At the sentencing hearing, the trial court recognized that it could not impose a one strike term based on using a firearm, and the firearm enhancement. It decided to impose the firearm enhancements, but also imposed a one strike term based on the existence of multiple victims, since the jury necessarily found that there were multiple victims by convicting the defendant of the charged offenses, even though the information had not alleged a multiple-victim special circumstance. (*Ibid*.)

Mancebo reversed the defendant's sentence and held the court could not impose the one strike term based on the multiple-victim special circumstance since it was never pleaded in the information. (*Mancebo*, *supra*, 27 Cal.4th at p. 754.) *Mancebo* held the One Strike law required the special circumstance be alleged in the accusatory pleading, and either admitted by the defendant or found true by the finder of fact. It was not

enough to conclude that it should be applied since the substantive offenses involved multiple victims in the absence of the statutorily required allegations that specifically referred to the special circumstance. (*Id*. at pp. 743–745.)

> "[N]o factual allegation in the information or pleading in the statutory language informed defendant that if he was convicted of the underlying charged offenses, the court would consider his multiple convictions as a basis for One Strike sentencing .... Thus, the pleading was inadequate because it failed to put defendant on notice that the People, for the first time at sentencing, would seek to use the multiple victim circumstance to secure indeterminate One Strike terms ...." (*Id*. at p. 745.)

Mancebo acknowledged that the People relied on *Thomas* for the argument that a specific statutory enumeration was not required for a valid pleading. However, *Mancebo* distinguished the situation because the defendant in *Thomas* had not demonstrated he was prejudiced by the incorrect wording of the information. (*Mancebo*, *supra*, 27 Cal.4th at pp. 747–748.) *Mancebo* found "little doubt" the prosecution understood the express pleading requirements of the One Strike law, and "the People's failure to include a multiple-victim-circumstance allegation must be deemed a discretionary charging decision." (*Id*. at p. 749.) *Mancebo* acknowledged that other statutes used similar " 'pled and proved' or 'alleged and found true' language ...." (*Id*. at p. 745, fn. 5.) Nevertheless, it cautioned that "our holding is limited to a construction of the language of section 667.61 .... We have no occasion in this case to interpret other statutory provisions not directly before us." (*Ibid*.)

Mancebo also held that the defendant did not forfeit the error by failing to object because the defendant received an unauthorized sentence since it violated the "pled and proved" requirement of the One Strike law. As a result, the principles of waiver and forfeiture did not apply to " 'legal error resulting in an unauthorized sentence [that] commonly occurs where the court violates mandatory provisions governing the length of confinement.' [Citation.]" (*Mancebo, supra,* 27 Cal.4th at p. 749, fn. 7.)

The People acknowledge the holding in *Mancebo* but argue the instant case is controlled by *People v. Tardy* (2003) 112 Cal.App.4th 783 (*Tardy*), where the information charged the defendant with robbery and alleged eight prior prison term enhancements. The jury found the defendant not guilty of robbery and guilty of the lesser included offense of petty theft. At the bifurcated hearing on the prior conviction allegations, the People informed the court that the defendant was actually guilty of petty theft with a prior theft-related conviction (§ 666) since he had previously been convicted of a qualifying theft offense, and it was going to request a felony sentence under that statute. After this disclosure, the defendant waived his right to a jury trial and admitted the prior conviction allegations. The court found the defendant had a prior strike conviction and a prior theft conviction within the meaning of section 666 and dismissed the prior prison term enhancements in the interest of justice. The court then sentenced the defendant to a felony term under section 666. (*Tardy*, *supra*, at pp. 785–786.)

Tardy rejected the defendant's claim that the court's imposition of the felony sentence violated due process even though the information did not specifically charge him under section 666. The defendant conceded the accusatory pleading for robbery necessarily placed him on notice that he could be convicted of the lesser included offense of petty theft but argued there was no allegation that he could receive a felony sentence if convicted of the misdemeanor. (*Tardy, supra,* 112 Cal.App.4th at pp. 786–787.)

> "Contrary to [the defendant's] suggestion, section 666 does not establish a separate, substantive 'crime' of petty theft with a prior conviction. Rather, it is a sentencing statute, establishing an alternate and elevated penalty for a petty theft conviction upon a finding of a qualifying prior conviction. [Citation.]
>
> "Unlike many other sentencing statutes directed to recidivists, section 666 by its terms does not require the statute to be specifically pleaded in the information or indictment. [Citations.] Nor do constitutional principles of due process require that the statute be specifically alleged as long as the pleading apprises the defendant of the

potential for the enhanced penalty and alleges every fact and circumstance necessary to establish its applicability. [Citations.]" (*Id*. at p. 787.)

Tardy held the accusatory pleading that charged the defendant with the greater offense of robbery, with several prior prison term for theft offenses, necessarily placed him on notice of the greater offense of robbery, the lesser included offense of petty theft, and "prior theft convictions and prison terms to support an enhanced sentence. Just as there was no due process obligation to separately allege the lesser included offense of petty theft [citation], there is no due process requirement to specify section 666 when that enhancement relates solely to the unpleaded (but constitutionally noticed) lesser included offense and every fact necessary to establish section 666 is subsumed in the prior conviction/prison enhancement allegations set forth in the accusatory pleading." (*Tardy, supra*, 112 Cal.App.4th at p. 788.)

Tardy rejected the defendant's reliance on *Mancebo* and held it stood "for the limited proposition that a defendant is entitled to notice of the specific facts that will be used to support an enhanced sentence. Facts alleged and proved only as part of the substantive crime charged cannot later be used to support a sentencing enhancement. [Citation.] [The defendant's] sentence, however, unlike *Mancebo's*, was enhanced based on facts specifically pleaded and proved as enhancements." (*Tardy*, *supra*, 112 Cal.App.4th at p. 789.)

In this case, the People argue defendant was properly sentenced based on *Tardy*. The People particularly rely on *Tardy's* limitation of *Mancebo*, and state there was no similar due process requirement in this case to separately charge defendant under the alternate sentencing scheme of section 273.5, subdivision (f)(1), since the amended information alleged every fact needed to support the enhanced sentence and section 273.5 did not include a pleading and proof requirement. The People thus conclude defendant's sentence was based on facts specially pleaded and proved, i.e., the three prior convictions attached to count X.

J. Cross and Wilford

There are two additional cases that are relevant to defendant's contentions but were not addressed by either party on appeal.

In *People v. Cross* (2015) 61 Cal.4th 164 (*Cross*), the defendant was charged with a felony violation of section 273.5, subdivision (a). It was further alleged that the defendant had a prior conviction for violating section 273.5 for purposes of enhanced punishment, pursuant to the former version of subdivision (e)(1). At trial, the defendant's attorney stipulated to the prior conviction. The trial court accepted counsel's stipulation without advising the defendant of any trial rights or penal consequences of admitting the prior conviction. The jury convicted the defendant and found the prior conviction to be true. The defendant was sentenced to the upper term of five years. (*Cross*, at pp. 168–169.)

Cross held the defendant had not forfeited his due process claim by failing to object because it raised a pure question of law. (*Cross*, *supra*, 61 Cal.4th at pp. 171–172.) *Cross* ordered the sentence stricken and held *Boykin*, *Tahl*, and *Yurko*[15] applied when a defendant admits by stipulation all necessary facts for imposing an enhanced punishment under section 273.5, former subdivision (e)(1). (*Cross*, at pp. 168, 174, 179.) *Cross* held the subdivision authorized the trial court to impose a greater punishment on the defendant if the jury found he was guilty of the charged offense, and he had previously been convicted of violating section 273.5. The defendant, through his attorney, "stipulated that he had previously been 'convicted of a felony violation of Penal Code Section 273.5.' Because he admitted 'every fact necessary to imposition of the additional punishment other than conviction of the underlying offense' [citation], he was entitled to receive *Boykin-Tahl* warnings before he made this admission." (*Cross*, at p. 174.)

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[15] *Boykin v. Alabama*(1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122; *In re Yurko* (1974) 10 Cal.3d 857.

In reaching this holding, *Cross* rejected the People's argument that former subdivision (e)(1) was simply an alternate sentencing scheme. *Cross* observed that the defendant was sentenced to five years under the increased triad, whereas he would have faced no more than four years but for his stipulation to the previous conviction. "[W]e do not see a meaningful distinction between an 'enhancement' and an 'alternative sentence scheme' in this context." (*Cross*, *supra*, 61 Cal.4th at p. 175.)

Cross further held that "section 273[, subdivision] (f)(1) has the same *effect* as an enhancement." (*Cross*, *supra*, 61 Cal.4th at p. 178.) As another court later explained, it did not matter in *Cross* "whether section 273.5, subdivision (f)(1) was labeled an enhancement or an alternative sentencing scheme. [Citation.]" (*Wilford*, *supra*, 12 Cal.App.5th at p. 840.)

In *Wilford*, the information alleged the defendant committed two counts of violating section 273.5, subdivision (a). As to both counts, the information included a special allegation under section 273.5, subdivision (h)(1). That subdivision states that if the defendant is granted probation after being convicted of violating section 273.5, and has a prior conviction for certain enumerated offenses, the court shall order the defendant to be imprisoned in county jail for not less than 15 days as a condition of probation. (*Wilford*, *supra*, 12 Cal.App.5th at pp. 835–836, fn. 6.) The information in *Wilford* "indicated the effect of the allegation was a minimum sentence of 15 days," and alleged prior convictions attached to those counts. (*Id*. at p. 836.) The defendant was convicted of both counts and the court found the prior conviction allegations true. (*Ibid*.)

At the sentencing hearing, the prosecutor moved to sentence the defendant to prison for both counts pursuant to the increased triad of section 273.5, subdivision (f)(1), and argued the increased sentence was supported by the court's true finding for the prior convictions attached to the two counts, even though they had been alleged under subdivision (h)(1) that addressed probationary terms. Defense counsel did not object, and

the court sentenced the defendant to an increased term under subdivision (f)(1). (*Wilford*, *supra*, 12 Cal.App.5th at p. 836.)

On appeal, the defendant in *Wilford* argued his due process rights were violated when he was sentenced pursuant to a subdivision that was not pleaded in the information. The People replied that the sentence was valid under *Tardy* because subdivision (f)(1) was an alternate sentencing scheme and did not include a pleading and proof requirement. (*Wilford*, *supra*, 12 Cal.App.5th at pp. 836–837.)

Wilford held the defendant was improperly sentenced to the increased term in violation of his due process rights based on the circumstances of that case.

> "Although the amended information here did allege that [the defendant] had been convicted of a qualifying offense within the previous seven years, the pleading referenced section 273.5, subdivision (h)(1) as the special allegation with the effect of adding 15 days to [the defendant's] sentence…. Nothing in the amended information gave any hint that the prosecution also sought to make [the defendant] subject to the provisions of section 273.5, subdivision (f)(1), which would increase the applicable sentencing range." (*Wilford*, *supra*, 12 Cal.App.5th at p. 838.)

Wilford found it was not a case "of citing the wrong statute by mistake. The People do not argue that they intended to list section 273.5, subdivision (f)(1), but mistakenly listed subdivision (h)(1). And there was no advisement, anywhere in the pleading, that the prosecution would use the 'factual allegations' again, to increase [the defendant's] sentence under section 273.5, subdivision (f)(1)." (*Wilford*, *supra*, 12 Cal.App.5th at p. 838.)

Wilford distinguished *Tardy* because the prosecution in that case "advised the defendant of its intent to use the qualifying prior offenses for felony sentencing (petty theft with a prior) before the defendant waived his right to a jury trial on the issue. In contrast, here, the prosecution notified [the defendant] it was seeking an increased sentence after the jury returned its verdict and the court had found true that [the defendant] had been convicted of a qualifying offense under section 273.5, subdivision

(h)(1). For these reasons, we do not find *Tardy* … instructive here." (*Wilford*, *supra*, 12 Cal.App.5th at p. 838.)

Wilford acknowledged that every fact necessary to impose the increased sentence under section 273.5, subdivision (f)(1) was alleged in the information and found true but found the defendant's due process rights were violated under the circumstance of the case, and defendant was prejudiced by the violation.

> "The problem here was that [the defendant] was not appraised [*sic*] of the possible prison sentence he was facing. The People, however, maintain this lack of notice did not matter because subdivision (f)(1) is not an enhancement but a sentencing statute. Thus, the People insist, 'There was no requirement to mention … section 273.5, subdivision (f) by name when every fact necessary to establish [section] 273.5, subdivision (f) was included in the prior conviction allegations set forth in the accusatory pleadings.' As such, the People place great weight on the distinction between an enhancement and a sentencing statute. Under the facts of this case, we find this distinction immaterial.…" (*Wilford*, *supra*, 12 Cal.App.5th at pp. 838–839.)

Wilford further noted that in *Cross*, the California Supreme Court rejected "this very distinction, albeit in a different context. [Citation.]" (*Wilford*, *supra*, 12 Cal.App.5th at p. 839.) While *Wilford* did not involve *Boykin*, *Tahl*, or *Yurko*, it found the court's reasoning in Cross "implies that the People's branding of section 273.5, subdivision (f)(1) as a sentencing statute does not end our analysis." (*Wilford*, at p. 839.)

> "Here, it is undisputed that the amended information did not warn [the defendant] that a finding of a prior qualifying conviction under section 273.5, subdivision (h)(1) would increase his sentence range under counts 5 and 6 from two, three, or four years to two, four, or five years. [Citation.] And although the facts necessary to impose the sentence under section 273.5, subdivision (f)(1) are the same as were alleged under section 273.5, subdivision (h)(1), there is no indication in the amended information of the possibility of this increased punishment. *This is a critical shortcoming here where [the defendant] was offered and rejected a plea bargain prior to trial. [Citation.] Even though we do not know if [the defendant] would have accepted the plea bargain had he known of the increased punishment for counts 5 and 6, we are certain the amended information did not provide him with such information on which to make an informed decision.*

Alternatively stated, [the defendant] was not informed of the potential of the enhanced penalty. [Citation.]

"In short, on the facts before us, we conclude it is inconsequential whether section 273.5, subdivision (f)(1) is labeled an enhancement, alternative sentencing scheme, or a sentencing statute. The amended information specified that, for counts 5 and 6, [the defendant] faced a sentence of two, three, or four years with the possibility of an additional 15 days under section 273.5, subdivision (h)(1) for each count. There was no indication whatsoever that [the defendant] faced the possibility of a sentence of two, four, or five years for each of those same offenses under section 273.5, subdivision (f)(1). *Further, the prosecutor only sought an increased sentence under that subdivision after the jury returned its verdict and the court found true the qualifying prior conviction*. The resulting sentence under section 273.5, subdivision (f)(1) violated [the defendant's] due process rights and cannot stand." (*Id.* at p. 840, italics added.)

K. Analysis

In this case, the information alleged in count X that defendant committed corporal injury in violation of section 273.5, subdivision (a). It further alleged that defendant had three prior convictions for violating section 273.5, subdivision (a), pursuant to subdivision (e)(2). As explained above, former subdivision (e) previously stated the increased sentencing triad but the subdivisions were redesignated in 2013 and the information should have cited subdivision (f)(1).

We find defendant did not suffer prejudice from the pleading error based on the entirety of the record. First, this case does not present the same situation that was addressed in *Cross*, and there was no violation of *Boykin*, *Tahl* and *Yurko*. Defendant did not admit, stipulate, or enter a plea to any charges or prior conviction allegations in this case. Defendant repeatedly declined to waive time and demanded a jury trial on the substantive charges. He decided to waive a jury trial on the prior conviction allegations only after he was convicted of the substantive offenses, and the court properly advised him of the requisite warnings and obtained his waivers.

Second, defendant argues his due process rights were violated as found in *Mancebo* because the trial court in this case imposed the increased sentence under

subdivision (f)(1) of section 273.5 even though it was not alleged in the information. *Mancebo*, however, addressed the express pleading and proof requirements for the special circumstances stated in section 667.61, the One Strike law, and held the trial court in that case could not impose sentence based on a special circumstance that had not been pleaded or proved in accordance with the statute. Section 273.5 does not contain the same express pleading and proof requirements, but defendant still has a due process right to be informed of the charges against him.

Third, the People rely on *Tardy* and assert that any pleading error was not prejudicial because every fact necessary for defendant's increased sentence under section 273.5, subdivision (f)(1) was pleaded and proved since the consolidated information alleged three domestic violence convictions for count X, the court found those convictions true, and subdivision (f)(1) is an alternate sentencing scheme and does not contain the same express pleading and proof requirements as the One Strike law discussed in *Mancebo*. The People's reliance on *Tardy* is not persuasive. The basis for the holding in *Tardy* was that court's conclusion that the applicable statute in that case merely addressed an alternate sentencing scheme instead of any type of sentence enhancement. (*Tardy*, *supra,* 112 Cal.App.4th at p. 787.) *Cross* specifically rejected any type of "meaningful distinction between an 'enhancement' and an 'alternative sentence scheme' " and held that the enhanced sentencing triad of section 273.5, subdivision (f)(1) had "the same *effect* as an enhancement." (*Cross, supra,* 61 Cal.4th at pp. 175, 178.) *Wilford* similarly rejected the claim that subdivision (f)(1) was merely an alternate sentencing scheme because "[t]here was no indication whatsoever that [the defendant] faced the possibility of a sentence of two, four, or five years for each of those same offenses under section 273.5, subdivision (f)(1)." (*Wilford*, *supra*, 12 Cal.App.5th at p. 840.)

The ultimate question in this case is whether the citation in the consolidated information to the incorrect statute – former subdivision (e)(2) instead of the re-

designated subdivision (f)(1) – constituted a "defect or imperfection in matter of form" which resulted in prejudicing "a substantial right of the defendant upon the merits." (§ 960.) As explained above, a valid accusatory pleading "need not specify by number the statute under which the accused is being charged," and " 'even a reference to the wrong statute has been viewed of no consequence' " when the defendant has not been prejudiced by the error. (*Thomas*, *supra*, 43 Cal.3d at p. 826.) "[A] variance between the information and sentence generally does not offend due process unless a defendant is misled to his prejudice in presenting a defense. [Citation.]" (*Wilford, supra,* 12 Cal.App.5th at p. 837.) A reference to an incorrect penal statute "can be overcome by factual allegations adequate to inform the defendant of the crime charged. [Citations.]" (*People v. Haskin*, *supra*, 4 Cal.App.4th at p. 1439.)

We find defendant was not prejudiced by the reference in the consolidated information to former subdivision (e)(2) based on several distinguishing facts in this case. As we have already explained, in contrast to *Cross*, defendant did not enter into any pleas, admissions, or stipulations to the truth of the prior convictions alleged as to count X.

Wilford found the pleading error was prejudicial in that case, but that finding was based on circumstances not present herein. In *Wilford*, the information expressly alleged that defendant had a prior conviction within the meaning of section 273.5, subdivision (h)(1). Subdivisions (h)(1) through (h)(3) exclusively address situations where a defendant is convicted of a current violation of section 273.5, subdivision (a) with a prior domestic violence conviction, he or she is going to be placed on probation and permits the court to impose jail time as a condition of probation. (§ 273.5, subd. (h).) In *Wilford*, however, the trial court relied on the proof of the prior conviction to instead sentence the defendant to an enhanced term in state prison under subdivision (f).

In the instant case, the consolidated information alleged defendant had three prior convictions for violating section 273.5 and cited to former subdivision (e)(2). As

explained above, at the time of defendant's case, the subdivisions had been redesignated and subdivision (e) only addressed the definition of parentage; it did not provide for any other type of sentencing as was the situation in *Wilford*.

More importantly, the consolidated information in this case alleged the three prior convictions using the exact language and circumstances set forth in subdivision (f)(1). Subdivision (f)(1) states:

> "Any person convicted of violating this section for acts occurring within seven years of a previous conviction under subdivision (a), or subdivision (d) of Section 243, or Section 243.4, 244, 244.5, or 245, shall be punished by imprisonment in a county jail for not more than one year, or by imprisonment in the state prison for two, four, or five years, or by both imprisonment and a fine of up to ten thousand dollars ($10,000)."

The allegation attached to count X stated:

> "It is further alleged, pursuant to subdivision 273.5(e)(2), that the defendant has, within the seven years prior to the acts constituting a violating of this subsection, suffered the following prior conviction(s) of Penal Code section 273.5…."

The allegation then listed defendant's three prior convictions for violating section 273.5 in 2009 and 2011, within seven years of the charged offense.

Thomas explained that a pleading is not defective if it omits the specific statute being alleged. In addition, a reference to an incorrect penal statute "can be overcome by factual allegations adequate to inform the defendant of the crime charged. [Citations.]" (*People v. Haskin, supra*, 4 Cal.App.4th at p. 1439.) In this case, comparing the language of the prior conviction allegations attached to count X in the consolidated information, to the various subdivisions of section 273.5, there was only one subdivision that was being alleged: Defendant had prior convictions for violating section 273.5, subdivision (a), those convictions occurred within seven years of the current offense, and the allegation was clearly referring to the enhanced triad in subdivision (f)(1). While subdivision (f)(2) also stated an enhanced sentencing triad, that could only be triggered based on proof of a

prior conviction for violating section 243, subdivision (e), which was not alleged in this case.

In addition, there was no confusion in this case that the allegation about the prior convictions might have been referring to the probation provisions in subdivision (h) of section 273.5. The consolidated information, which alleged count X, also alleged defendant had a prior strike conviction pursuant to section 667, subdivisions (b) through (i), which left defendant ineligible for probation.

There is another important distinction between *Wilford* and this case for purposes of prejudice. *Wilford* held the defendant therein suffered prejudice not only because the prior conviction was alleged under subdivision (h) regarding probationary conditions, but the defendant engaged in plea negotiations and accepted a plea without understanding his maximum possible sentencing exposure. In contrast, there is no evidence in the record of this case that defendant engaged in any plea negotiations or discussions at any time.

Finally, *Wilford* found the defendant in that case was prejudiced by the pleading error because he was not aware that the prosecution was seeking a prison term based on the different sentencing triad until after he had waived his right to a jury trial. A different situation exists in this case. As set forth above, the court in this case addressed the People's motions in limine on the first day of trial, including whether defendant could be impeached with his prior felony violation, and the conduct underlying the two misdemeanor violations, of section 273.5, if he testified at trial. The court also granted the People's motion to introduce the same evidence pursuant to Evidence Code section 1109. Defense counsel objected to both motions, but the court overruled the objections.

In the midst of the pretrial motions, the court reviewed the consolidated information and discussed where it should edit the pleadings to omit references to the prior strike conviction, the prior prison term enhancements, and the prior domestic violence convictions. The following exchange occurred in the course of that discussion:

> "THE COURT: … It is alleged as to Count 10 that he has these priors. Now, as I understand it on [section] 273.5, the priors change the triad.
>
> "[THE PROSECUTOR]: Correct.
>
> "THE COURT: Really, that's a sentencing allegation. [¶] But … the People have to prove those—
>
> "[THE PROSECUTOR]: Correct.
>
> "THE COURT: To the trier of fact. So he's going to have to decide whether he wants a trial by this jury on those priors. Then he's also going to have to decide how he wants to handle the strike prior and his prison priors as well as the [on-bail] allegation."

Defense counsel did not express surprise, claim a lack of notice, or object to the court's statement that the prior convictions attached to count X constituted a sentencing allegation and changed the base sentence. Instead, counsel said he would consult with defendant and advise the court whether defendant would waive his right to a jury trial on the prior conviction allegations. After the jury's verdicts on the substantive offenses, the court fully and properly advised defendant of his constitutional right to a jury trial on the prior conviction allegations, that those allegations included a prior strike conviction, "some prior domestic violence convictions," a prior prison term enhancement, and a prior serious felony enhancement, and defendant waived that right and requested a court trial.

We thus conclude that this case is distinguishable from the situations presented in *Mancebo*, *Cross*, and *Wilford*. Section 273.5 did not contain an express pleading and proof requirement as in *Mancebo*, defendant never admitted or stipulated to the truth of the prior convictions as in *Cross*, and the pleading error was not prejudicial because he never entered into any plea negotiations, the erroneous allegation in the consolidated information cited a subdivision that did not contain any prior conviction provisions, the information alleged the identical language and circumstances that were consistent only with subdivision (f)(1), and the court expressly stated prior to trial in counsel's presence

that the allegation of the prior convictions attached to count X led to a different sentencing triad.

II. Consecutive Sentences for Counts III and IV

Defendant contends the court improperly imposed consecutive sentences for count III, residential robbery of Ms. Power, based on forcibly taking her cell phone, and count IV, residential burglary, based on his entry into the house. Defendant argues both acts were based on his single intent and objective of entering Meeks's house to gain control over Ms. Power.

A. The Court's Discussion of Section 654

At the sentencing hearing, the court stated that section 654 would not apply to counts III and IV, and the parties did not address those counts.

Instead, the court asked the parties whether section 654 applied to counts VI and VII, false imprisonment by violence and criminal threats to Ms. Power, because the offenses occurred during a continuous course of conduct once defendant entered Meeks's house.

The prosecutor argued section 654 did not apply to counts VI and VII because the offenses had separate objectives. The prosecutor argued the false imprisonment occurred when defendant pinned Ms. Power against the wall, and the criminal threats occurred when he told to get her stuff, they were going to leave, and not to scream or he would hurt her. The objective of the false imprisonment "was to get her to comply with his commands" and the objective of the criminal threats "was so that other people were not alerted."

The prosecutor argued defendant had different objectives when he entered Meeks's house. The prosecutor asserted that when defendant initially entered the house, he said he had caught Ms. Power lying because she was living with Meeks, and his objective was to find out if she was being unfaithful to him, and to assault and punish her for leaving him. As the incident continued, he decided to make her leave with him and

threatened her not to scream to alert anyone about what was happening. "[W]hile the objectives can be related, they are separate, and that is why they aren't [under section] 654."

Defense counsel argued defendant had one objective during the entire incident, and the same threats that supported count VII, criminal threats, also were the basis for count VI, false imprisonment by threats or violence.

B. The Court's Findings

The court found section 654 did not apply to counts III and IV, robbery and burglary, and consecutive sentences were appropriate.

> "[H]aving heard the evidence, [defendant], after committing the kidnapping of his friend [Kizziar], went to that house for the purpose of exerting his – and I hate to use this word because it is his last name – but his power over his wife. I mean, he essentially went into that house to take back what he believed had left him and that the thought was his, essentially treating a person like a piece of property, which to the Court is just unbelievably abhorrent.
>
> "*But in terms of his intent, when he entered the house, I see essentially what I will call the domestic violence portions of the case as a single course of conduct*.
>
> "*The exception, in my mind, is the robbery. He clearly did not go over the house intending to steal her cell phone by force*. I mean, had Ms. Power not had the good fortune to have … the neighbor come out and intervene by yelling at [defendant], it could well have been there was another [section] 207 [kidnapping] in process. I mean, this was –in my mind, this was essentially an attempted kidnapping of Ms. Power…." (Italics added.)

The court found defendant had repeatedly shown by his conduct that he treated "women as chattel" and used force when they did not do what he wanted. His conduct was "incredibly violent, incredibly dangerous to society, dangerous to everyone around him." The court found that even if he were eligible for probation, he would not be a candidate because of his violent behavior.

The court made further findings when it imposed the sentences for each count. As to counts III and IV, the court found the burglary was based on defendant's entry into the house, with the intent to "take back Ms. Power by any means necessary," but he did not intend to steal her cell phone when he entered the house. The court stated that count III involved a separate act of violence and separate intent.

The court stated it would impose a consecutive term for count IV because "there was a separate intent. [A]lthough it was part of the course of conduct at that time, it was a totally different intent than the reason he committed the burglary and entered the house…."

As to count III, robbery, the court imposed the consecutive term of 16 months (one-third the midterm), doubled to 32 months plus a consecutive term of four months (one-third the midterm of one year) for the personal use enhancement. As to count IV, residential burglary, the court imposed a consecutive term 16 months (one-third the midterm), doubled to 32 months.

C. Section 654, Burglary and Robbery

"Section 654 precludes multiple punishment for a single act or indivisible course of conduct punishable under more than one criminal statute. Whether a course of conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the 'intent and objective' of the actor. [Citation.] If all of the offenses are incident to one objective, the court may punish the defendant for any one of the offenses, but not more than one. [Citation.] If, however, the defendant had multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. [Citation.]" (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 267–268)

"It is [a] defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citation.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) The trial court "is vested with broad latitude in making its determination. [Citation.]" (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143.) As such, the reviewing court views the trial court's determination "in the light most favorable to the respondent and presume[s] the existence of every fact the trial court could reasonably deduce from the evidence. [Citation.]" (*Ibid*.)

"When a defendant is convicted of burglary and the intended felony underlying the burglary, section 654 prohibits punishment for both crimes. [Citations.]" (*People v. Islas* (2012) 210 Cal.App.4th 116, 130.) Section 654 generally bars punishment for both burglary and robbery where the sole purpose of the burglary was to effectuate the robbery or theft. (*People v. Le* (2006) 136 Cal.App.4th 925; *People v. Smith* (1985) 163 Cal.App.3d 908, 912.)

For example, in *People v. Perry* (2007) 154 Cal.App.4th 1521, the victim returned to his car to find the defendant inside of it. The defendant ran away with the victim's car stereo, and a screwdriver or ice pick in his hand. The victim tackled the defendant, who held his weapon at the victim and then escaped with the stereo. (*Id*. at p. 1523.) *Perry* held the defendant's objective in committing the burglary was the theft of the victim's car stereo, and the robbery was committed when the victim confronted the defendant. However, the defendant had the same objective when he committed the robbery – the theft of the car stereo. (*Id*. at p. 1527.) *Perry* found no evidence that the defendant acted with independent criminal objectives and held that the sentence for burglary should have been stayed under section 654. (*Ibid*.)

D. Analysis

Defendant argues the court improperly imposed consecutive sentences for counts III and IV because he had one intent throughout the entirety of the incident – "to assert his control over Kayla Power."

As to count IV, burglary, the jury was instructed with CALCRIM No. 1700 that the People had to prove defendant entered a building with the intent to commit larceny or any felony. The instruction further stated: "The People allege that the defendant intended to commit injury to a spouse, false imprisonment by violence, or criminal threats." These were the charges in counts II, VI, and VII.

As to count III, robbery, the jury was instructed with CALCRIM No. 1600 on the elements of the offense without including specific facts about the case.

In closing argument, the prosecutor argued defendant forced Kizziar to drive him to Meeks's house and entered without permission because "he intended to get to" Ms. Power and "he intended to hurt her." As to count IV, burglary, the prosecutor followed the instruction and argued defendant entered Meeks's house "to commit either corporal injury on Ms. Power, false imprisonment of Ms. Power, keeping her in that house or criminal threats, threatening her." When he entered the house, he did not have any other intent than to "put his hand on Ms. Power and cause her injury" because he was infatuated with her and did not like that she left him and was staying at Meeks's house.

As to count III, robbery, the prosecutor argued that it was not based on a traditional act of someone taking a person's purse and running away. Instead, it was based on the incident where defendant told Ms. Power they were going to leave the house and go to Kizziar's vehicle, he pulled the box cutter, and he threatened to harm her if she screamed. Ms. Power tried to get her cell phone and defendant forcibly took it away from her. The prosecutor argued defendant used force and threats "to prevent her from doing anything to resist him taking her phone." "What is the value of a phone when you're in a situation of [domestic violence]? Maybe calling 911, maybe trying to get somebody to help you." Defendant kept her cell phone when he ran away from the house because the deputy later "pinged" it and found it at the workplace of defendant's uncle.

The court's decision to impose consecutive sentences for robbery and burglary is supported by the record. Defendant pulled the box cutter and forced Kizziar to drive him

to Meeks's house. Kizziar kept trying to talk defendant out of it, but defendant took away Kizziar's cell phone before he walked to the house. There is no evidence defendant entered Meeks's house to commit a property crime. Instead, he immediately started to beat Ms. Power and continued to do so even though she was holding the baby in her arms. When defendant pulled the box cutter on Ms. Power and said they were going to Kizziar's vehicle, she reached for her cell phone and defendant grabbed it from her.

It would seem that defendant grabbed the cell phone to prevent Ms. Power from calling anyone who might interfere with defendant's plan to gain control over her. However, a distinguishing fact is that when defendant jogged back to the Jeep, and Kizziar drove him to Groveland, he returned Kizziar's cell phone as he left the vehicle, even though Kizziar could have called 911. In contrast, defendant did not discard Ms. Power's cell phone as when he left Meeks's house and jogged to Kizziar's Jeep, or even as Kizziar drove back into town. Instead, he held onto the cell phone and it pinged at his uncle's workshop when the deputies were trying to locate him. Defendant thus appeared to have multiple objectives when he forcibly took Ms. Power's cell phone, even though the robbery was part of an otherwise indivisible course of conduct. He may have intended to look through her cell phone to see who else she was contacting in the period after they separated.

We conclude the court's findings are supported by substantial evidence and it did not abuse it discretion when it imposed consecutive terms for counts III and IV.

III. Remand for Correction of the Record

Defendant requests, and the People agree, that the matter must be remanded for the court to correct the abstract of judgment and minute order from the sentencing hearing because they do not correctly reflect defendant's sentence on the individual counts.

For assistance on remand, we will review the sentence imposed in this case.

A. The Sentencing Hearing

As explained above, the court found true the special allegations that defendant had one prior strike conviction, one prior serious felony enhancement, one prior prison term enhancement, an on-bail enhancement, and three prior convictions as to count X.

On April 4, 2017, the court held the sentencing hearing, and imposed an aggregate second strike term of 33 years four months as follows, based on the reporter's transcript.

> Count I – Kidnapping of Kizziar: the upper term of eight years, doubled to 16 years as the second strike term; plus consecutive terms of five years for the prior serious felony enhancement (§ 667, subd. (a)), one year for the prior prison term enhancement (§ 667.5, subd. (b), and one year for the personal use enhancement (§ 12022, subd. (b)(1)).[16]
>
> Count III – Robbery: a consecutive term of 16 months (one-third the midterm), doubled to 32 months plus a consecutive term of four months (one-third the midterm of one year) for the personal use enhancement.
>
> Count IV – Burglary: a consecutive term of 16 months (one-third the midterm), doubled to 32 months.
>
> Count II – Corporal injury by threats or violence to Ms. Power: the upper term of three years, doubled to six years, and stayed pursuant to section 654.
>
> Count VI – False imprisonment by violence of Ms. Power: the upper term of three years, doubled to six years, and stayed pursuant to section 654.
>
> Count VII – Criminal threats to Ms. Power: the upper term of three years, doubled to six years, and stayed pursuant to section 654.
>
> Count VIII – Resisting arrest: a concurrent term of one year.
>
> Count X – Corporal injury to Ms. Martinez with prior convictions: a consecutive term of 16 months (one-third the midterm of four years), doubled to 32 months, plus a consecutive term of two years for the on-bail enhancement (§ 12022.1)

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[16] The court stated it imposed the upper term for count I because defendant took advantage of a position of trust and used extremely violence against Kizziar.

Count XI – False imprisonment of Ms. Martinez: the upper term of three years, doubled to six years, and stayed pursuant to section 654.

B. The Minute Order and Abstract of Judgment

Defendant notes there are errors in both the minute order and abstract of judgment.

Both the abstract of judgment, and the minute order for April 13, 2007, correctly state that defendant's aggregate sentence was 33 years four months, and that he was sentenced to a second strike term. However, both documents only state the term that was imposed for each count before the court doubled that sentence as the second strike term. In addition, the abstract does not state the actual sentences imposed and then stayed under section 654 for counts II, VI, VIII and IX.

On remand, the court must correct the entirety of the record as to defendant's sentence on each count.

IV. The Prior Serious Felony Enhancement

The court imposed a consecutive term of five years for the section 667, subdivision (a) prior serious felony enhancement.

At the time of the sentencing hearing, the court was statutorily required to impose the section 667, subdivision (a) enhancement and did not have any authority to strike or dismiss it. (§ 667, former subd. (a)(1); § 1385, former subd. (b).)

The parties agree that the matter must be remanded for the court to consider whether to dismiss the section 667, subdivision (a) prior serious felony enhancement in furtherance of justice, pursuant to the recent amendments to section 667 and section 1385 enacted by Senate Bill No. 1393, effective January 1, 2019, which removed the prohibitions on striking a prior serious felony enhancement. (See Stats. 2018, ch. 1013, §§ 1–2.)

Therefore, on remand, the court shall consider whether to strike the prior serious felony enhancement in furtherance of justice. We do not find that the court must strike

the enhancement, but only that the court must consider whether to exercise its discretion pursuant to the newly-enacted statutory provisions.

DISPOSITION

The matter is remanded to the superior court to correct the abstract of judgment and the minute order, and for the court to consider whether to strike the prior serious felony enhancement. The trial court shall prepare and forward to all appropriate parties a certified copy of an amended abstract of judgment.

In all other respects, the judgment is affirmed.

_____
POOCHIGIAN, Acting P.J.

WE CONCUR:

_____
SMITH, J.

_____
MEEHAN, J.